

ENTERED

AUG 26 1966

Mary B. Steel

F 2302

San Francisco Law Library

426 CITY HALL


No. 183210

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

See Vol. 331 add. papers

**In the United States Court of Appeals
for the Ninth Circuit**

SAFeway STORES, INCORPORATED; CONTINENTAL BAKING
COMPANY; LANGENDORF UNITED BAKERIES, INC.;
HANSEN BAKING COMPANY, INC., RICHARD HOYT;
BUCHAN BAKING Co., and GEORGE B. BUCHAN, PETI-
TIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

**On Petition to Review an Order of the
Federal Trade Commission**

BRIEF FOR RESPONDENT

FILED

OCT 22 1965

FRANK H. SCHMID, CLERK

JAMES MCI. HENDERSON,
General Counsel,

J. B. TRULY,
Assistant General Counsel,

CHARLES C. MOORE, JR.,
DANIEL H. HANSCOM,
Attorneys,

Attorneys for the Federal Trade Commission.

INDEX

	Page
Jurisdiction	1
Statement of the case	2
Proceedings before the Commission	2
Basic facts	5
Summary of argument	8
Argument	11
I. The Commission's finding that petitioners were parties to a price fixing conspiracy was proper	11
1. Substantial evidence in the record supports the Commission's finding that bread prices were tampered with, fixed and agreed to at meetings of Bakers of Washington, Inc.	14
2. Substantial evidence supports the finding that petitioners' trade association Bakers of Washington, Inc. was active in suppressing price competition on bread, and in securing adherence to establish bread prices, in the area of Bakers of Washington, Inc. membership	20
3. The Commission was justified in finding that petitioners were parties to the price fixing activities engaged in by their association Bakers of Washington, Inc.	28
4. The findings of the Commission where supported by substantial evidence, as they are in this proceeding, shall not be disturbed on review	37
5. Petitioners' arguments that the Commission relied only on "conscious parallelism," and that the activities of their trade association involved only "labor negotiations" and "collective bargaining," are unfounded	41

Argument—Continued

Page

II. The Commission had jurisdiction over the price fixing conspiracy to which petitioners were parties.....	45
1. Sales of bread to Alaskan customers f.o.b. dockside at Seattle were sales in interstate commerce, and subjected the challenged price fixing conspiracy to the jurisdiction of the Federal Trade Commission	45
2. Bread produced and sold within the State of Washington by integrated, multi-state corporations Continental, Langendorf and Safeway is sold in interstate commerce and any fixing of the price thereof is subject to the jurisdiction of § 5 of the Federal Trade Commission Act	49
3. An unlawful conspiracy between petitioners, Bakers of Washington, Inc., and others, fixing the price of bread in the State of Washington, is an unfair method of competition in interstate commerce regardless of whether or not petitioners' bread sales in the State of Washington are considered to be in interstate commerce	63
III. Petitioners were accorded a fair hearing before the Commission	66
1. The Commission could properly take official notice of facts about Continental established in a simultaneous proceeding before the Commission	66
2. The Commission properly found that in most particulars Continental failed to show the contrary of facts officially noticed	74
3. Chairman Dixon was not disqualified from participation in this proceeding	79

III

Argument—Continued	Page
IV. The Commission properly entered an order prohibiting petitioners from engaging in price fixing activities in any of the areas in which they sold bread	85
Conclusion	90

TABLE OF CITATIONS

Cases:

<i>Addyston Pipe & Steel Co. v. United States</i> , 175 U.S. 211 (1899)	46
<i>Advertising Specialty Nat'l Ass'n. v. Federal Trade Commission</i> , 238 F.2d 108 (1st Cir. 1956)	3, 40
<i>Allied Paper Mills v. Federal Trade Commission</i> , 168 F.2d 600 (7th Cir. 1948), <i>cert. denied</i> , 336 U.S. 918	40, 43
<i>American News Co. v. Federal Trade Commission</i> , 300 F.2d 104 (2d Cir. 1962), <i>cert. denied</i> , 371 U.S. 824	62, 88
<i>American Tobacco Co. v. United States</i> , 147 F.2d 93 (6th Cir. 1944), <i>aff'd</i> , 328 U.S. 781 (1946) ...	34, 39
<i>American Trucking Associations, Inc. v. Frisco Transportation Co.</i> , 358 U.S. 133 (1958)	71
<i>Amos Treat & Co. v. Securities and Exchange Commission</i> , 306 F.2d 260 (D.C. Cir. 1962)	83
<i>Apex Hosiery Co. v. Leader</i> , 310 U.S. 469 (1939) ..	47
<i>Bankers Securities Corp. v. Federal Trade Commission</i> , 297 F.2d 403 (3d Cir. 1961)	89
<i>Bienville Water Supply Co. v. Mobile</i> , 186 U.S. 212 (1901)	70
<i>Brite Mfg. Co. v. Federal Trade Commission</i> , 347 F.2d 477 (D.C. Cir. 1965)	73
<i>California Rice Industry v. Federal Trade Commission</i> , 102 F.2d 716 (9th Cir. 1939)	46, 65
<i>Chicago Board of Trade v. Olsen</i> , 262 U.S. 1 (1922)	62

IV

Cases—Continued

	Page
<i>Cole v. Hughes Tool Co.</i> , 215 F.2d 924 (10th Cir. 1954), <i>cert. denied</i> , 348 U.S. 927 (1955)	42
<i>Commissioner of Internal Revenue v. Sunnen</i> , 333 U.S. 591 (1948)	77
<i>Continental Baking Co. v. United States</i> , 281 F.2d 137 (6th Cir. 1960)	34
<i>Corn Products Co. v. Federal Trade Commission</i> , 324 U.S. 726 (1945)	37
<i>Country Tweeds, Inc. v. Federal Trade Commission</i> , 326 F.2d 144 (2d Cir. 1964)	89
<i>Crichton v. United States</i> , 56 F. Supp. 876 (S.D. N.Y. 1944), <i>aff'd</i> , 323 U.S. 684	69
<i>Dahnke-Walker Milling Co. v. Bondurant</i> , 257 U.S. 282 (1921)	46
<i>Dance Freight Lines, Inc. v. United States</i> , 149 F. Supp. 367 (E.D. Ky. 1957)	70
<i>De Gorter v. Federal Trade Commission</i> , 244 F.2d 270 (9th Cir. 1957)	38
<i>Denison Mattress Factory v. Spring-Air Company</i> , 308 F.2d 403 (5th Cir. 1962)	47
<i>E. B. Muller v. Federal Trade Commission</i> , 142 F.2d 511 (6th Cir. 1944)	73
<i>Esco Corporation v. United States</i> , 340 F.2d 1000 (9th Cir. 1965)	34, 38
<i>Eugene Dietzgen Co. v. Federal Trade Commission</i> , 142 F.2d 321 (7th Cir. 1944), <i>cert. denied</i> , 323 U.S. 730	34
<i>Federal Trade Commission v. Algoma Lumber Co.</i> , 291 U.S. 67 (1934)	35, 38
<i>Federal Trade Commission v. Bunte Bros.</i> , 312 U.S. 349 (1941)	53, 57, 64
<i>Federal Trade Commission v. Henry Broch & Co.</i> , 368 U.S. 360 (1962)	89
<i>Federal Trade Commission v. Cement Institute</i> , 333 U.S. 683 (1948)	30, 52, 64, 65, 80, 84
<i>Federal Trade Commission v. Colgate-Palmolive Co.</i> , 380 U.S. 374 (1965)	86
<i>Federal Trade Commission v. Motion Picture Advertising Service Co., Inc.</i> , 344 U.S. 392 (1953) ..	53
<i>Federal Trade Commission v. National Lead Co.</i> , 352 U.S. 419 (1957)	85, 89

Cases—Continued	Page
<i>Federal Trade Commission v. Pacific States Paper Trade Association</i> , 273 U.S. 52 (1927)	37
<i>Federal Trade Commission v. R. F. Keppel & Bros.</i> , 291 U.S. 304 (1934)	53
<i>Federal Trade Commission v. Raladam Co.</i> , 283 U.S. 643 (1931)	53
<i>Federal Trade Commission v. Ruberoid Co.</i> , 343 U.S. 470 (1952)	85, 89
<i>Federal Trade Commission v. Sun Oil Company</i> , 371 U.S. 505 (1963)	42
<i>Federal Trade Commission v. Tuttle</i> , 244 F.2d 605 (2d Cir. 1957), <i>cert. denied</i> , 354 U.S. 925..	53
<i>Ford Motor Co. v. Federal Trade Commission</i> , 120 F.2d 175 (6th Cir. 1941), <i>cert. denied</i> , 314 U.S. 668	55
<i>Foremost Dairies, Inc. v. Federal Trade Commission</i> , CCH 1965 Trade Cases ¶ 71,500 (5th Cir. 1965)	59, 86, 89
<i>General Motors Corp. v. Federal Trade Commission</i> , 114 F.2d 33 (2d Cir. 1940), <i>cert. denied</i> , 312 U.S. 682 (1941)	55
<i>Gerardi v. Gates Rubber Co. Sales Division, Inc.</i> , 325 F.2d 196 (9th Cir. 1963)	40
<i>Giant Food, Inc. v. Federal Trade Commission</i> , 307 F.2d 184 (D.C. Cir. 1962), <i>cert. denied</i> , 372 U.S. 910	88
<i>Gibbons v. Ogden</i> , 22 U.S. (9 Wheat.) 1 (1924) ...	52
<i>Glendenning v. Ribicoff</i> , 213 F. Supp. 301 (W.D. Mo. 1962)	71
<i>Globe Readers Service, Inc. v. Federal Trade Commission</i> , 285 F.2d 692 (7th Cir. 1961)	38
<i>Grand Union Co. v. Federal Trade Commission</i> , 300 F.2d 92 (2d Cir. 1962)	88
<i>Heald v. United States</i> , 175 F.2d 878 (10th Cir. 1949), <i>cert. denied</i> , 338 U.S. 859	39
<i>Hernandez v. United States</i> , 300 F.2d 114 (9th Cir. 1962)	37
<i>Hills Brothers v. Federal Trade Commission</i> , 9 F.2d 481 (9th Cir. 1926), <i>cert. denied</i> , 270 U.S. 662	58

Cases—Continued

Page

<i>Hitchman Coal & Coke Co. v. Mitchell</i> , 245 U.S. 229 (1917).....	35
<i>Holland Furnace Company v. Federal Trade Commission</i> , 269 F.2d 203 (7th Cir. 1959), <i>cert. denied</i> , 361 U.S. 928 (1960).....	57
<i>Interstate Circuit, Inc. v. United States</i> , 306 U.S. 208 (1939).....	39
<i>Isaacs v. United States</i> , 301 F.2d 706 (8th Cir. 1962), <i>cert. denied</i> , 371 U.S. 818.....	37
<i>Jacob Siegal Co. v. Federal Trade Commission</i> , 327 U.S. 608 (1946).....	85
<i>Kitcart v. Metropolitan Life Ins. Co.</i> , 88 F.2d 407 (8th Cir. 1937).....	70
<i>Kline v. United States</i> , 41 F. Supp. 577 (D. Neb. 1941).....	73
<i>Korber Hats, Inc. v. Federal Trade Commission</i> , 311 F.2d 358 (1st Cir. 1962).....	89
<i>Las Vegas Merchant Plumbers Ass'n. v. United States</i> , 210 F.2d 732 (9th Cir. 1954), <i>cert. denied</i> , 348 U.S. 817.....	60
<i>Lewis v. Shell Oil Co.</i> , 50 F. Supp. 547 (N.D. Ill. 1943).....	58
<i>Lieberthal v. North Country Lanes, Inc.</i> , 332 F.2d 269 (2d Cir. 1964).....	61
<i>Louisiana Farmers Protective Union v. Great A & P Tea Co.</i> , 131 F.2d 419 (8th Cir. 1942)...	47
<i>Lowe v. McDonald</i> , 221 F.2d 228 (9th Cir. 1955).....	70
<i>Mandeville Island Farms v. American Crystal Sugar Co.</i> , 334 U.S. 219 (1948).....	52
<i>Marquette Cement Mfg. Co. v. Federal Trade Commission</i> , 147 F.2d 589 (7th Cir. 1945), <i>aff'd</i> , 333 U.S. 683 (1948).....	80
<i>Maryland Baking Company v. Federal Trade Commission</i> , 243 F.2d 716 (4th Cir. 1957).....	86, 89
<i>McDaniel v. Celebrezze</i> , 217 F. Supp. 952 (D. Md. 1963), <i>aff'd</i> , 331 F.2d 426 (4th Cir. 1964)...	71
<i>Moore v. Mead's Fine Bread Co.</i> , 348 U.S. 115 (1954).....	52, 59
<i>Myers v. Shell Oil Co.</i> , 96 F. Supp. 671 (S.D. Cal. 1951).....	58

VII

Cases—Continued

Page

<i>National Fire Insurance Co. v. Thompson</i> , 281 U.S. 331 (1930)	70
<i>National Labor Relations Board v. Express Publishing Co.</i> , 312 U.S. 426 (1941)	87
<i>National Labor Relations Board v. Truitt Mfg. Co.</i> , 351 U.S. 149 (1956)	44
<i>National Lead Company v. Federal Trade Commission</i> , 227 F.2d 825 (7th Cir. 1955), <i>aff'd</i> , 352 U.S. 419 (1957)	39, 43
<i>National Macaroni Manufacturers Association v. Federal Trade Commission</i> , 345 F.2d 421 (7th Cir. 1965)	37, 38
<i>Niresk Industries, Inc. v. Federal Trade Commission</i> , 278 F.2d 337 (7th Cir. 1960), <i>cert. denied</i> , 364 U.S. 883	85
<i>P. Saldutti & Son v. United States</i> , 210 F. Supp. 307 (D. N.J. 1962)	70
<i>Page v. Work</i> , 290 F.2d 323 (9th Cir. 1961), <i>cert. denied</i> , 368 U.S. 875	60
<i>Paramount Cap Mfg. Co. v. National Labor Relations Board</i> , 260 F.2d 109 (8th Cir. 1958)	69, 70
<i>Patterson v. United States</i> , 222 Fed. 599 (6th Cir. 1915), <i>cert. denied</i> , 238 U.S. 635	47
<i>Pittsburgh Plate Glass Co. v. National Labor Relations Board</i> , 313 U.S. 146 (1940)	69
<i>Progress Tailoring Co. v. Federal Trade Commission</i> , 153 F.2d 103 (7th Cir. 1946)	55
<i>R. H. Macy v. Federal Trade Commission</i> , 326 F. 2d 445 (2d Cir. 1964)	88
<i>Salt Producers Ass'n. v. Federal Trade Commission</i> , 134 F.2d 354 (7th Cir. 1943)	65
<i>Santa Cruz Co. v. National Labor Relations Board</i> , 303 U.S. 453 (1937)	46
<i>Shreveport Macaroni Mfg. Co., Inc. v. Federal Trade Commission</i> , 321 F.2d 404 (5th Cir. 1963), <i>cert. denied</i> , 375 U.S. 971 (1964)	60
<i>Standard Container Mfg. Ass'n. v. Federal Trade Commission</i> , 119 F.2d 262 (5th Cir. 1941)	46, 59, 61
<i>Standard Distributors v. Federal Trade Commission</i> , 211 F.2d 7 (2d Cir. 1954)	38

VIII

Cases—Continued

Page

<i>State of Wisconsin v. Federal Power Commission</i> , 201 F.2d 183 (D.C. Cir. 1952), <i>cert. denied</i> , 345 U.S. 934.....	70
<i>Stauffer Laboratories, Inc. v. Federal Trade Commission</i> , 343 F.2d 75 (9th Cir. 1965).....	35, 37
<i>Steers v. United States</i> , 192 Fed. 1 (6th Cir. 1911)	47
<i>Swanee Paper Corp. v. Federal Trade Commission</i> , 291 F.2d 833 (2d Cir. 1961), <i>cert. denied</i> , 368 U.S. 987 (1962)	88
<i>Texaco, Inc. v. Federal Trade Commission</i> , 336 F.2d 754 (D.C. Cir. 1964)	83
<i>The Borden Company v. Federal Trade Commission</i> , 339 F.2d 953 (7th Cir. 1964)	58, 59
<i>Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.</i> , 346 U.S. 537 (1954)	42
<i>Times-Picayune Pub. Co. v. United States</i> , 345 U.S. 594 (1952)	47, 48, 53
<i>United Biscuit Company of America v. Federal Trade Commission</i> , CCH 1965 Trade Cases ¶ 71,528 (7th Cir. 1965)	86
<i>United States v. Abilene & Southern Ry. Co.</i> , 265 U.S. 274 (1924)	72
<i>United States v. E. I. du Pont</i> , 353 U.S. 586 (1957)	51
<i>United States v. Frankfort Distilleries</i> , 324 U.S. 293 (1945)	52
<i>United States v. General Electric Company</i> , 80 F. Supp. 989 (S.D.N.Y. 1948)	44
<i>United States v. Learner Company</i> , 215 F. Supp 603 (D. Hawaii 1963)	48
<i>United States v. McKesson & Robbins</i> , 351 U.S. 305 (1955)	47, 61
<i>United States v. National Retail Lumber Dealers Ass'n</i> , 40 F. Supp. 448 (D. Col. 1941)	48
<i>United States v. Paramount Pictures, Inc.</i> , 334 U.S. 131 (1948)	39
<i>United States v. Patten</i> , 226 U.S. 525 (1913)	44
<i>United States v. Pierce Auto Freight Lines</i> , 327 U.S. 515 (1945)	69, 72

IX

Cases—Continued

Page

<i>United States v. Pink</i> , 315 U.S. 203 (1942).....	70
<i>United States v. Shubert</i> , 348 U.S. 222 (1954)	56
<i>United States v. Socony-Vacuum Oil Co.</i> , 310 U.S. 150 (1940)	35, 39, 46, 61
<i>United States v. South-Eastern Underwriters Assn.</i> , 322 U.S. 533 (1944)	52, 56, 82
<i>United States v. Swift & Company</i> , 196 U.S. 375 (1905)	62, 82
<i>United States v. United States Gypsum Co.</i> , 333 U.S. 364 (1948)	77
<i>United States v. Yellow Cab Co.</i> , 332 U.S. 218 (1946)	48
<i>Universal Camera Corp. v. National Labor Rela- tions Board</i> , 340 U.S. 474 (1951)	38
<i>Western Sugar Refining Co. v. Federal Trade Commission</i> , 275 F. 725 (9th Cir. 1921)	73
<i>Wickard v. Filburn</i> , 317 U.S. 111 (1942)	65
<i>Willard Dairy Corp. v. National Dairy Products Corp.</i> , 309 F.2d 943 (6th Cir. 1962), <i>cert. de- nied</i> , 373 U.S. 934 (1963)	58
<i>Yee Chun v. Nagle</i> , 35 F.2d 839 (9th Cir. 1929) ..	69

Statutes:

Administrative Procedure Act:

Section 7(d), 60 Stat. 237, 5 U.S.C. § 1006 (d)	67, 68
----------------------------------------------------------	--------

Clayton Act:

Section 2(a), 38 Stat. 730, as amended, 49 Stat. 1526, 15 U.S.C. § 13(a)	58
-----------------------------------------------------------------------------------	----

Federal Trade Commission Act:

Section 5(a), 66 Stat. 632, 15 U.S.C. 45(a) ..	1, 52, 53, 58, 59
Section 5(c), 52 Stat. 112-3, 15 U.S.C. 45(c) ..	2, 90
Section 5(d), 72 Stat. 943, 15 U.S.C. 45(d) ..	2

Congressional References:

<i>Final Report of the Attorney General's Commit- tee on Administrative Procedure</i> , S. Doc. No. 8, 77th Cong., 1st Sess. (1941)	68
--------------------------------------------------------------------------------------------------------------------------------------------------	----

Rules:	Page
Federal Trade Commission Rules of Practice for Adjudicative Proceedings, 16 C.F.R. (Supp. 1965):	
Section 3.14(d)	68
Other Authorities:	
<i>Attorney General's Manual on the Administra- tive Procedure Act</i> (1947)	68, 73, 75
Davis, <i>Administrative Law Treatise</i> , Vol. 2, p. 403	70
Davis, <i>Official Notice</i> , 62 Harv. Law Rev. 537 (1949)	67

**In the United States Court of Appeals
for the Ninth Circuit**

No. 19,325

Safeway Stores, Incorporated; Continental Baking Company; Langendorf United Bakeries, Inc.; Hansen Baking Company, Inc., Richard Hoyt; Buchan Baking Co., and George B. Buchan, Petitioners

v.

Federal Trade Commission, Respondent

**On Petition to Review an Order of the
Federal Trade Commission**

BRIEF FOR RESPONDENT

This case is before the Court upon petition to review an order to cease and desist issued by the Federal Trade Commission at the conclusion of administrative proceedings on a complaint charging petitioners, among others, with violating § 5 of the Federal Trade Commission Act, as amended, 66 Stat. 632, 15 U.S.C. § 45, by fixing prices and suppressing price competition in the sale of bread.

JURISDICTION

The jurisdiction of the Commission is based upon the Federal Trade Commission Act, § 5(a) (1) and (6).¹ The

¹ Sections 5(a)(1) and (6) read:

“(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared

jurisdiction of the Court rests upon §§ 5(c) and (d) of the Act, the pertinent provisions of which are as follows:

Sec. 5(c) Any person, partnership or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the . . . court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used . . . by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. . . . The findings of the Commission as to the facts, if supported by evidence, shall be conclusive . . . [52 Stat. 112-3, 15 U.S.C. 45(c).]

Sec. 5(d) Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive. [72 Stat. 943, 15 U.S.C. 45(d).]

Petitioners all utilized the challenged practices within the jurisdictional area of this Court.

STATEMENT OF THE CASE

Proceedings before the Commission

In its complaint, issued March 7, 1961, the Commission charged that Continental Baking Company, Langendorf United Bakeries, Inc., Safeway Stores, Inc., Hansen Baking Co., Inc., Buchan Baking Co., Bakers of Washington, Inc. (a trade association), and others,² were

unlawful." 66 Stat. 632, 15 U.S.C. 45(a)(1).

"(6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." 66 Stat. 632, 15 U.S.C. 45(a)(6).

² Petitioners were all named in the Commission's complaint. The Commission's proceeding, however, was not only against petitioners individually, but against all members of Bakers of Washington,

engaged in unfair acts and practices and unfair methods of competition in commerce by:

... cooperating, combining, conspiring, agreeing and entering into understandings and following a planned common course of action to hinder, lessen, restrict and suppress competition among and between themselves and others in the production, distribution and sale of bread. [Para. EIGHT of Complaint, R. I, 6.] ³

Additional specifications were set out in Paragraphs NINE, TEN and ELEVEN of the Commission's complaint. These paragraphs cited the use of Bakers of Washington, Inc. by petitioners and others as an instrument for suppressing price competition in the sale of bread, meetings of Bakers of Washington, Inc. (including petitioners) in Seattle at which bread prices were agreed upon, and the employment of Arthur H. Lalime, secretary-manager of Bakers of Washington, Inc., as an agent for suppressing bread price competition. Petitioners, except Safeway, all admitted to membership in Bakers of Washington, Inc. All denied engaging in the price fixing activities alleged, and all denied the jurisdiction of the Commission.

Inc., as a class. Cf. *Advertising Specialty Nat'l Ass'n. v. Federal Trade Commission*, 238 F.2d 108 (1st Cir. 1956). All members of the association were named in the Commission's order (R. II, 814-815, 985). The following coconspirators named in the complaint have not sought review: Bakers of Washington, Inc., Trennery's Bakery Co., Snyder's Bakery, Inc., John M. Larson, trading as Larson's Bakery, Vic H. Goethals, trading as Fortune's Bakery, and Holsum Baking Company. Arthur H. Lalime, the former secretary-manager of Bakers of Washington, Inc., also named in the complaint is now deceased, and was not mentioned in the order.

Buchan Baking Co., and George B. Buchan, president of Bakers of Washington, Inc., and of Buchan Baking Co., filed a petition for review June 5, 1964. By letter dated June 9, 1965, counsel for those two petitioners advised that he had been instructed "not to go forward" with their petition, but as far as we know the petition has not been withdrawn.

³ "R" refers to reproduced transcript of record before the Court. Roman numerals indicate the volume, Arabic numerals show page.

Hearings were held⁴ before an examiner who concluded after 73 numbered findings of fact that:

The activities of respondents as set forth in the findings taken together add up to a conspiracy and combination on the part of respondents to fix prices and compel adherence to them and constitute unfair methods within the intent and meaning of Section 5 of the Federal Trade Commission Act. [R. I-A, 545.]

On appeal, the Commission sustained the hearing examiner and adopted the initial decision and order "as supplemented and modified" by its opinion issued February 28, 1964 (R. II, 813-866). The Commission in its decision took official notice of certain facts about Continental which were developed in another case before the Commission, *In the Matter of Continental Baking Company*, Docket 7630. These officially noticed facts related to the organization and conduct of Continental's multi-state bread business from its New York headquarters. They had been derived from Continental's own executives and company records in Docket 7630. Continental objected to such official notice and on April 27, 1964, petitioned the Commission for "reconsideration or reopening" (R. II, 873). The Commission reopened the proceeding on May 21, 1964 to permit an opportunity to "show the contrary" of the facts officially noticed (R. II, 877). Continental then attempted through company witnesses to portray its Washington bread business as "local," and not controlled from New York headquarters. Upon the termination of proceedings on reopening the hearing examiner recommended that the Commission affirm its original judgment of February 28, 1964. The Commission did so, and on December 3, 1964, directed that the original order of February 28, 1964, "become effective forthwith" (R. II, 999). In the meantime Continental, on October 21, 1964, had moved to disqualify Chairman Dixon from any "consideration or participation in this

⁴ The Commission's attorneys subpoenaed 15 witnesses and introduced 30 exhibits. Petitioners offered no evidence.

proceeding." The alleged basis for disqualification was Chairman Dixon's participation in 1959, before his appointment to the Commission, in certain hearings of the Subcommittee on Antitrust and Monopoly of the Senate Committee of the Judiciary, 86th Cong., 1st Sess., relating to "administered prices" in the bread industry. Chairman Dixon, however, after analyzing the legal and factual basis of Continental's motion, declined to disqualify himself (R. II, 913-922). The Commission's "Final Order" was issued simultaneously with its "Opinion After Reopening." Petitioners now seek review.

Basic facts

Bakers of Washington, Inc. was originally incorporated as Bakers of Western Washington, Inc., to "develop and promote better understanding and friendly association" among baking companies, and to employ such agents "as the business may require to coordinate the efforts of all those engaged in the baking industry for the promotion, development and conduct of the baking industry" (R. IV, 1000-04). The only office of Bakers of Washington, Inc. was located in Seattle (R. III, second page 34) and more than half its members had their places of business there (R. IV, 1025-27). The other members were located in the surrounding towns of western Washington particularly Aberdeen, Bellingham, Tacoma, and Yakima, where divisions of the association were organized (R. IV, 1027). However, all dues were paid to Bakers of Washington, Inc. in Seattle (R. III, second page 34). Officials of petitioners Continental, Langendorf, Hansen Baking Co., Inc. and Buchan Baking Co. all held official positions in Bakers of Washington, Inc. (R. IV, 1018). Executives of Buchan and Hansen were president and vice-president respectively. A Continental official was on the "Executive Committee," and Langendorf was a "Trustee." Continental, Langendorf, Hansen and Buchan were also the leading baking companies in Seattle (R. III-A, 262; R. III-C, 57 near end of volume), and bore the largest pro-

portionate share of the financial burden of Bakers of Washington, Inc. (R. III, 78; R. IV, 1025).⁵

Continental has two baking plants in Seattle, one for bread and one for cake (R. III-B, 397). Plants are also maintained in Takoma and Spokane (R. III-B, 398, 401). Continental sells its bakery products "everywhere" in the State of Washington (R. III-B, 401). The Seattle plants of Continental, however, market their output principally in the western part of Washington (R. III-B, 397) although sales are made to Alaska (R. III-B, 397-398), and to the Continental plant in Portland, Oregon (R. III-B, 399). The Washington bakeries of Continental are part of a coast-to-coast baking complex with headquarters in New York, which had net sales in 1960 of \$410,642,040 (R. IV, 1080).

Langendorf, like Continental, also conducts a multi-state baking business. Eleven plants are operated in all the major cities on the Pacific coast (R. I, 298; R. III-A, 312), and bakery products are marketed in California, Washington and Oregon. Two bakeries, a bread plant and a cake plant, are maintained in Seattle (R. III-A, 312). Bread and bakery products produced by these plants are shipped throughout the Puget Sound area, east to Yakima, Ellensburg, and Moses Lake in Washington, and to customers in Alaska (R. I, 252; R. III-A, 313, 343). Total net sales of bread and other bakery products by Langendorf amounted to \$73,825,340 for the fiscal year ending in 1961, and 3,896 persons were then employed (R. I, 298, 299). Headquarters of Langendorf is in San Francisco, and the state of incorporation is Delaware.

Safeway is one of the nation's three largest operators of chain retail grocery stores (R. I, 301, 302). Safeway bakes and sells its own private label brand of bread, "Mrs. Wright's" (R. III, 152), but also sells "Wonder Bread," the "brand name" bread of Continental (R. III-A, 194).

⁵ Petitioner Safeway paid \$600 annually directly to the secretary-manager of Bakers of Washington, Inc. (R. III, second page 32), and usually attended meetings (R. III, 80).

In contrast to the multi-state operations of Continental, Langendorf and Safeway, Buchan Baking Co. and Hansen Baking Co., Inc., operated plants only in the State of Washington. Buchan maintained four plants, one in Bellingham, two in Seattle, and one in Takoma (R. III-A, 179). Annual dollar volume in 1960 was about \$4,000,000 (R. III-A, 180). Bread and bakery products were marketed throughout the Puget Sound area (R. I, 231), and shipments were made to customers in Alaska (R. III-A, 230). Hansen operated two bakeries, one in Seattle and one in Takoma (R. III-A, 288). Annual volume approximated \$3,000,000. Hansen also marketed its bread and bakery products principally in the Puget Sound area, except for "small quantities" of bread sold to customers in Alaska (R. I, 214, 270).

The remaining baking companies named in the Commission's complaint were small concerns operating in Yakima and Bellingham, except for Holsum Baking Company. Holsum sold bread in Washington, including Yakima, from its plant in Lewiston, Idaho, after it acquired Trennery's bakery in Yakima⁶ (R. I, 279-280). All, however, were members of Bakers of Washington, Inc.

Bakers of Washington, Inc. held regular meetings, usually weekly, although not necessarily so, at the Washington Athletic Club in Seattle (R. III, 81, 87, 92). Such meetings were generally luncheon gatherings, and after lunch there would be a discussion (R. III, 129-130). Attendance was normally between ten to fourteen bakers from the Seattle area (R. III, 92). Representatives of Continental, Langendorf, Safeway, Hansen and Buchan were regularly present (R. III, 80-82). Bread prices and price increases, labor matters, and other items of interest to the baking industry, were taken up at these informal weekly meetings (R. III-A, 189-190, 260-61; R. III-B, 488-489, 493). As will be seen, these price "discussions"

⁶ That sales in the State of Washington by this member of the alleged conspiracy were in interstate commerce is unquestioned by petitioners (R. I, 189; R. III, 21).

were not innocuous, innocent generalities as claimed by petitioners in their briefs to this Court. Bakers of Washington, Inc. meetings were also held in the "divisions," for example, in Bellingham and Yakima, "whenever something develops" (R. III, second page 36). The secretary-manager of Bakers visited these divisions frequently (R. III, second page 39). Bakers of Washington, Inc. and its officials repeatedly acted to stop bread price cutting and bread price "wars" throughout the area of its membership, including Bellingham and Yakima (R. III, 41-46; 50-57; R. III-A, 251-270; 282; R. III-B, 356-366; 374-388; 464-469; 475-483; 488-495; 513-519).

Bread prices of Continental, Langendorf, Hansen, and Buchan were identical on the standard one and one-half pound white loaf (R. IV, 1028, 1029, 1033, 1035-1039, 1042, 1044, 1048; R. III-A, 185, 194; R. III-B, 412). Price increases, moreover, were simultaneous, or essentially so. Thus, on July 22, 1957 Buchan and Langendorf both raised prices from 30¢ to 31¢ per loaf (R. IV, 1028, 1044, 1046). On August 11, 1958 Continental, Langendorf, Hansen and Buchan all made simultaneous and identical increases from 31¢ to 33¢ (R. IV, 1048, 1042, 1033, 1029). On September 19, 1960, Langendorf and Hansen both made increases from 33¢ to 34¢ (R. IV, 1046; R. III-B, 450), and were followed three days later by identical and simultaneous increases by Continental and Buchan (R. IV, 1075, 1028), likewise from 33¢ to 34¢. All price increases "stuck." There were no "false starts"; no one attempted to raise bread prices and had to rescind the increase (R. III-A, 237).

SUMMARY OF ARGUMENT

The Commission found that the activities of Bakers of Washington, Inc., its secretary-manager, and all of its members, including Continental, Langendorf, Buchan, and Hansen, and in addition Safeway, taken together "added up" to a combination and conspiracy to stabilize bread prices and to prevent price cutting on bread in the geo-

graphic area of the Bakers of Washington, Inc. membership. The findings of the Commission are supported by substantial evidence on the record as a whole. Petitioners cannot disassociate themselves from the uncontradicted proof of the price fixing activities of Bakers of Washington, Inc., its secretary-manager and officers. Petitioners, moreover, met together at weekly or biweekly gatherings at the Washington Athletic Club where price fixing discussions took place, not just "general discussions of economic conditions" in the "context of labor negotiations" (Cont. brief, 48).⁷ Such price "discussions" at meetings of Bakers of Washington, Inc. furthermore cannot be separated from the price fixing activities, and the proselyting actions against price competition, of the full time manager of Bakers who customarily presided at Bakers meetings. The claim of Continental (brief, 57), Langendorf (brief, 33) and Safeway (brief, 30) that they knew nothing of, and did not authorize, the price fixing activities of the association's secretary-manager (Lalime, and before him Alford), or of the president (George B. Buchan) and the vice-president (Richard Hoyt) of Bakers, cannot be credited.⁸ Relevant to this contention, for example, is the testimony of the manager of Bakers, Arthur H. Lalime,⁹ who testified (R. III, second page 41) that he worked by personal contact, using "every persuasion" of which he was capable, against price competition among Bakers membership which included, of course,

⁷ For example, decisions among baking companies were made at such meetings to raise prices. In the words of the owner of a small bakery who attended, "they decided that we should have a raise in our bread" (R. III-A, 260). This is obviously a price fixing agreement, not a "general discussion of economic conditions."

⁸ Even Hansen Baking Co. Inc. makes this contention (brief, 33), although the evidence shows Hansen's own secretary (Richard Hoyt) to have acted personally, with the representative of Bakers of Washington, Inc., obviously Lalime, to stop price cutting in Bellingham (R. III-B, 467-472).

⁹ Arthur H. Lalime was hired to replace Harry Alford, deceased, who had held the position of manager of Bakers of Washington, Inc. for the prior 20 years (R. III, second page 7, 23).

petitioners. (Safeway in effect was a member of Bakers making a regular payment to the secretary-manager, and usually attending meetings, as earlier described.) For another example, George B. Buchan, one of petitioners and president of Bakers of Washington, Inc., personally took part in an effort to suppress price cutting in Bellingham (R. III-B, 467-471). It is therefore untrue that petitioners were implicated in Bakers price fixing activities because of "mere membership" in the association.

Contrary to the arguments of petitioners, the Commission had jurisdiction over the subject price fixing notwithstanding the bread involved was produced in Washington and principally sold therein, because: (a) sales of bread to Alaskan customers f.o.b. dockside at Seattle, as well as certain other interstate shipments, were sales in interstate commerce, and subjected the price fixing conspiracy to § 5 of the Federal Trade Commission Act; (b) price fixing in local markets by Continental, Langendorf, and Safeway, operating national or regional businesses on an integrated basis from out-of-state headquarters, and using all the instrumentalities of interstate commerce, is in interstate commerce subject to § 5; (c) a combination or conspiracy involving out-of-state corporations doing business in many states fixing the price of bread within the State of Washington is in interstate commerce subject to § 5.

Finally, it was proper for the Commission to take official notice of facts about Continental derived from Continental's own officials and records in another proceeding simultaneously before the Commission. In fact, § 7(d) of the Administrative Procedure Act specifically authorizes the use of official notice by administrative agencies such as the Commission. Nor was Chairman Dixon disqualified from participating in the proceedings after remand, or at any time. The Order entered by the Commission properly and reasonably prohibited petitioners from price fixing activities in each market where they sold bread, and under applicable precedents was an allowable exercise of the Commission's judgment.

ARGUMENT

I. The Commission's finding that petitioners were parties to a price fixing conspiracy was proper.

Before turning to the details of the proof of price fixing, a preliminary contention of petitioners should be answered. Continental (brief, 10, 58-59), and Langendorf and Hansen (brief, 8-9, 28) claim that as wholesale bakers they were not "concerned" with retail bread prices, and had no interest in them. This contention cannot stand scrutiny. Continental, Langendorf, Hansen and Buchan bake and sell their bread to retail outlets, typically supermarkets and grocery stores, who resell to the public. They are the principal wholesale bakers in the Puget Sound area (R. III-A, 262; R. III-C, second page 57). Safeway produces its own line of bakery products including bread, which it sells in its stores under the Safeway brand "Mrs. Wright's" (R. III, 152). Safeway, and other supermarkets, also carry the advertised brands of petitioner's bread, such as Continental's "Wonder Bread" (R. III-A, 194, 264). A 1¢ price differential on supermarket shelves between name brands like "Wonder Bread" and private label brands such as "Mrs. Wright's" has customarily existed in the industry (R. III-A, 209-211, 264; R. III-B, 476-477).

Continental, Langendorf, Hansen and Buchan stamp the resale price to the consumer on the bread wrapper (R. III-A, 206, 319-320; R. IV, 1029), and the price they receive for their bread from the retail store is 20% off the retail price printed on the wrapper. The Langendorf Seattle manager stated in an affidavit (R. I, 249) that the wholesale price was "retail price minus 20%." The Continental Seattle manager testified concerning wholesale prices:

Q. Mr. Covington, when you bill your customers for bread that you sell them wholesale, how do you bill them?

A. The regular retail price less 20 per cent. [R. III-B, 443.]

The president of Buchan Baking Co. testified that his bread price in 1956 was "30 cents, less 20%. That would make the wholesale price" (R. III-A, 181). In 1960 it was "34 cents, less 20%." The secretary-manager of Bakers of Washington, Inc. testified, as follows:

Q. So that if bread is selling for 34 cents for a 1½ lb. loaf—they are selling it at 34 cents now, are they not?

A. I think so.

Q. Then the wholesalers give 20% off to the retailers?

A. Yes. [R. III, second page 42.]

It is thus obvious that the retail price and the price Continental, Langendorf, Hansen and Buchan received for their bread were intimately related. A decline in the level of retail prices of bread in any market would be reflected in the wholesale price received by Continental, Langendorf, Hansen, and Buchan.¹⁰ Hence, any successful attempt to stabilize or fix prices at the retail level would result in fixed prices at the wholesale level. It is further evident that the price of Safeway's private label bread likewise was tied to the retail price of brand name bread on the shelves of its stores, and available elsewhere in the area. Whether Safeway is dubbed a "retailer" (Safe. brief, 21), or is a type of wholesale baker for its own supermarkets, makes not a particle of difference so far as its interest in maintaining the level of retail bread prices is concerned.

Ordinary white bread is a standardized product (R. III, second 37; R. III-A, 199-200), and price cutting at the retail level in any area would have affected the profits of Continental, Safeway, Langendorf, Hansen, Buchan, and the other bakers in the area. As the Seattle manager of Langendorf testified:

¹⁰ All price quotations by Continental, Langendorf, Hansen and Buchan to supermarkets, and other retail customers, were in terms of the retail price to the public (R. IV, 1028, 1029, 1033, 1035-39, 1042, 1044, 1048) and were identical.

. . . . For instance, down in Aberdeen last week, there was a supermarket advertising bread, two loaves for 29 cents, in-store bakery. That affects our business tremendously. [R. III-A, 317.]

Bread price cutting is likely to spread among markets geographically proximate. The president of the "Washington Retail Bakers Association," which maintains headquarters in Seattle, testified that price cutting could spread from one market to an adjacent market. This official owned and operated a retail bakery in Seattle. He testified that he was aware of the bread "price war" in 1959 in Bellingham, about 90 miles from Seattle, and feared it would spread to Seattle, as follows:

Q. As president of that association, was your attention directed to the price war in Bellingham in 1959?

A. We were aware of it, yes, sir.

* * * *

Q. Were you interested financially from the standpoint of the sale of your bread?

A. I think I was, yes.

Q. Why?

A. I have to make a living in my own business. I don't want the price of my bread to go down.

Q. Was there an overlap in the marketing area? Do you sell in Bellingham?

A. No, sir. It might reflect in Seattle. [R. III, 140-141.]

The president of Buchan Baking Co., who was also president of Bakers of Washington, Inc., under examination by his own counsel, confirmed the foregoing testimony by stating his fears with respect to price cutting in the Yakima area:

Q. Do you concern yourself with prices over there [Yakima]?

A. No—well, of course. If they have a price war, I suppose we would be concerned, *we wouldn't like it too well because it might spread.* [R. III-A, 234, emphasis added.]

Thus, Continental, Langendorf, Hansen, Buchan and Safeway all had a direct economic interest in retail bread prices throughout the geographic area where Bakers of Washington, Inc. had members. The geographic area of Bakers of Washington, Inc. membership was western Washington including Yakima.¹¹ Price cutting anywhere in this area was of concern to Bakers of Washington, Inc., members thereof, and petitioners.

1. Substantial evidence in the record supports the Commission's finding that bread prices were tampered with, fixed and agreed to at meetings of Bakers of Washington, Inc.

As has been shown, Continental, Langendorf, Safeway, Hansen, and Buchan regularly attended frequent Bakers of Washington, Inc. meetings (R. III, 81-82).¹² In fact, Continental, Langendorf, Hansen and Buchan were on a special list kept in the office of Bakers of Washington, Inc. of those interested in being personally called and informed of every Seattle meeting (R. III-A, 175; R. IV, 1024). The Seattle division meets at the Washington Athletic

¹¹ Bakers of Washington, Inc. was not "state wide in scope" as Continental's brief says (p. 14, n. 1). Forty-eight of its 49 members were located in western Washington (R. IV, 1025, 1027). In fact the name of the association was originally "Bakers of Western Washington" (R. IV, 1010). Nor was the Commission's complaint and evidence limited to the "Seattle, Washington market" as Continental also states (brief, 13). The complaint and evidence concerned price fixing in the entire area where Bakers of Washington, Inc. members sold bread, including cities beyond Seattle such as Bellingham and Yakima.

¹² Concerning Safeway, the manager of Bakers of Washington, Inc., who customarily presided at meetings, testified:

Q. Does a representative of the Safeway organization attend meetings of the Bakers of Washington, Inc?

A. Their labor relations man would on occasion during contract negotiations.

Q. *What about their divisional bread man?*

A. He would attend meetings.

Q. He does regularly attend meetings?

A. *Usually, not always.*

[R. III, 80, emphasis added.]

Club (R. III, 92; R. III-A, 259). The manager of Bakers testified: "At times we have a meeting every week, not always every week" (R. III, second page 36). More than 26 meetings are held every year, but less than 52 (R. III, 114). Meetings of members in Bellingham, Aberdeen, Yakima and Tacoma are also held from time to time. The manager of Bakers visited these divisions "[a]nytime something happens that would require it" (R. III, second page 38). The Seattle luncheon meetings at the Athletic Club were informal, and were set up for a small group (R. III, 92; R. III-B, 493).

In the summer of 1958 a meeting of the Bellingham Division of Bakers of Washington, Inc. was held. George B. Buchan, the president of Bakers and president of petitioner Buchan, was present, as well as the secretary of Hansen Baking Company (R. III-B, 466-467, 471-473), who was also vice-president of Bakers (R. IV, 1018). The owners of local Bellingham bakeries were also present including those of "Fortune's Bakery" and "Hall's Bakery" (R. III-B, 467, 471). The latter had been invited by "the representative of the Bakers of Washington, Inc." (R. III-B, 468-473). Price fixing activities took place at this meeting, participated in by petitioners Buchan and Hansen, and included a discussion of bread prices, the price increase that was about to take place, and an attempt to bring recalcitrant local bakers into line "pricewise." A witness, Robert Hall of Hall's Bakery, testified:

Q. And can you tell us what transpired at that meeting?

A. Discussion of prevailing prices, and the bread rise that was about to take place and—

Q. Continue. Have you finished your answer?

A. Yes.

Q. Was there any discussion of what Hall's Bakery intended to do with its price conduct?

A. Yes. Hall's Bakery had been known as a cut-rate bakery and they would like to have us join and follow on line with the rest of the bakeries. [R. III-B, 467.]

After this meeting in Bellingham "[t]here was a price increase in bread" (R. III-B, 473).

Albert Pettersen, a former bakery supervisor for Albertson's Stores, Inc., a food chain, testified as to what transpired at meetings of Bakers of Washington, Inc., at the Washington Athletic Club in Seattle, also in the summer of 1958, shortly before the bread price increase on August 11, 1958:

Q. . . . Do you recall attending any meetings at the Washington Athletic Club of the Bakers of Washington, Inc. in which prices were discussed, around that period?

A. Yes, I did.

Q. What would be the nature of the price discussion that you heard?

A. Well we discussed the labor, we discussed our price of our material—flour, shortening, sugar. And labor had jumped so high that *they decided that we should have a raise in our bread*. From there we just took it and they said, "What do you think about certain prices?" and they kicked it around and, so that is as far as it went as long as I sat there. . . . [R. III-A, 260, emphasis added.]

After these meetings Pettersen testified that Bakers of Washington, Inc., informed him of a price increase to be made:

Q. Did you receive information that prices were going up after this series of meetings?

A. Yes, sir.

Q. And how did you get that information?

A. Well, I believe it was a form sent to us. Now I am not sure whether it was a form or he called me, Art Lalime called me. I don't know whether it was a paper or telephone call.

Q. It was just the one instance when he called you or sent you a notice or was there more than one instance.

A. Well, there was more than one instance because *we weren't sure on different items to go up on, like on buns and specialty breads.* [R. III-A, 261, emphasis added.]

It is significant that on August 11, 1958 Continental, Langendorf, Hansen and Buchan all put into effect identical increases from 31¢ to 33¢ (R. IV, 1048, 1053, 1042, 1046, 1033, 1028-1029).

Mr. Harry H. Schafer, who had owned a small wholesale bakery in the City of Bellingham for 28 years (R. III-B, 487), who was a member of Bakers of Washington, Inc., and who attended meetings on occasion at the Athletic Club in Seattle, testified:

Q. Did you ever hear any discussions of prices or price rises when you were at a meeting of the Bakers of Washington, Inc.?

A. Yes, sir.

Q. What would be the circumstances of such discussions? Would they usually occur around labor contract periods or what?

A. That is the reason for raising 'em.

Q. The question was: Were those meetings around the period of the signing of the new contracts? Was that when you heard discussions of prices?

A. Sometimes before and after our contract was signed.

Q. Would you hear price discussions at other periods at these meetings or were they generally localized around the contract periods?

A. Mostly contract periods, yes.

Q. And what would be the nature of the discussions that you heard?

A. "Well we're going to use red ink if we don't do something about the bread price." [R. III-B, 489.]

Schafer, as the owner of a baking company, looked to Bakers of Washington, Inc. as the *bellwether for prices* (R. III-B, 491), as follows:

Q. Was there someone looked to in those meetings to be the bellweather [sic] for prices?

A. Well, usually the head of the Bureau [Bakers of Washington, Inc.] At that time it was Mr. Alford.

Schafer further testified as to price discussions at the meetings:

Q. Were the price discussions that you heard when you were at meetings—were they by groups off at one end of a table or were they general, around the room so that everybody was listening to everybody else or how were they conducted?

A. The luncheons were really not too large and I think we overheard everybody pretty well when they were discussing *what they were going to do*—or not what they were going to do but what they had to do, I'll say, on labor and profits. [R. III-B, 493, emphasis added.]

After a price cutting incident in Yakima, a meeting attended by "nearly all bakeries in the city of Yakima, including retail and wholesale" was held at the Chinook Hotel (R. III-B, 383). All members of Bakers of Washington, Inc. with plants in Yakima were present (R. III-B, 384-385). These were Snyder's Bakery, Inc., a "trustee" of Bakers (R. IV, 1018), Eddy Bakeries Company, Inc., Larson's Bakery, Sigman Food Stores, and Trennery's Bakery (R. IV, 1027). Continental, Langendorf and Safeway, of course, also marketed their bakery products in the Yakima area. The meeting discussed "co-ordinating the prices a little bit" (R. III-B, 385). Some of the retail bakers were having "trouble" because the wholesale bakers were selling "day old" bread at a discount. They expressed their feelings about this practice to the wholesalers "very definitely" (R. III-B, 386). Also price cutting was occurring in Yakima, "shooting prices" with price cuts which were "sometimes rather ridiculous" (R. III-B, 386). All present:

agreed that we would not shoot prices on large white and large whole wheat, a pound and a half loaves, we wouldn't shoot the prices on those. [R. III-B, 386.]

The foregoing establishes beyond question that meetings of Bakers of Washington, Inc. were utilized to obtain agreement on price increases, and to stop price cutting. Discussions at such meetings were not limited to innocuous "generalities," as petitioners seek to convince this Court, and as they unsuccessfully sought to convince the hearing examiner and the Commission. As witness Pettersen stated under oath telling how the August 11, 1958 price increase came about: "*they decided that we should have a raise in our bread.*" Pettersen was a responsible official in charge of the bakery department of a large food chain, and his testimony has never been contradicted. Bread prices closely thereafter were raised by Continental, Langendorf, Hansen and Buchan. The testimony of witness Schafer also reveals that agreement on price increases occurred at meetings of Bakers of Washington, Inc. Schafer's testimony that the consensus of the baking executives present, "*we're going to use red ink if we don't do something about the bread price,*" clearly shows an unlawful understanding among them that bread prices were to be raised. Further, according to Schafer, the baking company representatives at these meetings discussed with each other "*what they were going to do*" on prices, and what they "*had*" to do to maintain "*profits.*" The testimony of witness Robert Hall shows "hard core" price fixing activities by officers of petitioners Buchan and Hansen. These officials went to Bellingham and discussed with local bakers at a meeting in Bellingham the "*bread rise that was about to take place,*" and sought to have a local price cutter "*join and follow on line with the rest of the bakeries.*" After the meeting in Bellingham "there was a price increase in bread" (R. III-B, 473).

Illegal tampering with price levels through an understanding and meeting of the minds is obvious from such evidence. Bread prices went up three times in western

Washington between 1957 and 1960 (R. III-A, 181, 237; R. I-A, 527). No increases were aborted (R. III-A, 237; R. III-B, 494). Any conformance to an agreed or jointly contemplated pattern of conduct will warrant an inference of conspiracy. *Esco Corporation v. United States*, 340 F.2d 1000, 1008 (9th Cir. 1965); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1947). The foregoing, while sufficient to support the Commission's findings, is, however, not all the evidence of price fixing by petitioners in this record.

2. Substantial evidence supports the finding that petitioners' trade association Bakers of Washington, Inc. was active in suppressing price competition on bread, and in securing adherence to established bread prices, in the area of the Bakers of Washington, Inc. membership.

In addition to the price fixing discussions at its meetings, Bakers of Washington, Inc. was energetic in preventing and stopping price cutting. Albert A. Pettersen testified that, as bakery products supervisor for Albertson's Stores, Inc., he once advertised raisin bread in the Seattle "Post-Intelligencer" at 19¢ per loaf (R. IV, 1032; R. III-A, 250-251) when the current selling price was 26¢ per loaf (R. III-A, 256). The "secretary-manager" of Bakers of Washington, Inc., telephoned him:

A. . . . he said that he thought I should get my regular price for raisin bread instead of dropping the price of raisin bread to 19 cents.

Q. What was the regular price, if you remember?

A. I think it was 26 cents.

Q. Did he call you more than once or what happened?

A. Yes, I have been called about twice to three times.

Q. What did you do about it?

A. Well I told him that I would try and do something about it. But I don't think it is anybody's

business what the instore bakeries sell their bread for. It is an instore promotion. It's a specialty loaf of bread.

Q. Did you know Mr. Lalime personally?

A. Yes, sir.

Q. Did you at any time talk with him about this matter personally other than on the phone?

A. Just on the phone.

* * * *

Q. Tell us as much as you can remember of Mr. Lalime's approach to you on the subject. What did he say? What was his argument.

A. Well, he thought maybe we might have a bread war if I keep fooling around with the price of bread. [R. III-A, 255-57.]

On cross-examination by counsel for Bakers, Pettersen testified that Lalime told him that *another wholesale baking company had complained about the 19¢ price advertised by Albertson's* (R. III-A, 273-74).

Pettersen himself had also used Bakers of Washington, Inc. to cope with bread price-cutting in the City of Bellingham. His company had opened a new supermarket in Bellingham in 1959 and bread prices were "off-list" in the area. Pettersen testified:

Q. Did you do anything about this?

A. Well, I called the Washington Bakers Association, Mr. Art Lalime, and told him he had better do something about the price of bread up here.

Q. What did he say?

A. Well, he said he would. Otherwise I said, "I would do something to get my price down a little bit too but I couldn't meet that price but that I would have to drop it." [R. III-A, 258-59.]

* * * *

Q. Did he say anything to you with regard to going down?

A. Well he told me, "No, don't you go down. You just wait and let me take care of this" [R. III-A, 259.]

Again, on cross-examination by counsel for Bakers and Lalime, Pettersen testified:

Q. When you called Mr. Lalime regarding the price situation in Bellingham, what did you expect him to do about it?

A. Well, *Mr. Lalime represents all the bakers here in the State of Washington and he is supposed to kind of keep us all in line, to try to help us all out. That is his job, to keep [sic] the people that belong to the association and to keep the prices up to where they belong.* [R. III-A, 273-74, emphasis added.]

Previously in 1957, some price-cutting on bread had broken out in Bellingham. Bennett A. Haggen, a supermarket owner with an in-store bakery, and two other local bakeries, began selling their own baked bread at "two for 45 cents" (R. III-B, 356-57). Haggen, however, was not selling the "advertised brands" of bread at cut prices (R. III-B, 370). Haggen testified that the secretary of Bakers of Washington, Inc. came to see him about this price cutting. Haggen, at that time, was either a member of Bakers or had shortly before withdrawn from membership (R. III-B, 363, 367). Haggen had not previously met Lalime who had only recently been hired as secretary-manager of Bakers (R. III-B, 366). Lalime introduced himself to Haggen (R. III-B, 357), stating that he was representing "Bakers of Washington" (R. III-B, 366), and they had a discussion as to bread prices (R. III-B, 358, 361), Haggen testified:

We discussed the price of bread, I'd say, and fitted it in with our economics and we felt that we were selling it ridiculously cheap at two for 45 cents and that in order to make a profit, we would have to get a higher price on bread, yes. [R. III-B, 361.]

Shortly after Lalime's visit to Bellingham the price-cutting by "in-store" bakeries ceased (R. III-B, 366).

In November of 1959 a similar instance of price-cutting occurred in Bellingham (R. III, second page 42). Lalime admitted that he went up to Bellingham "specifically because of the price war" (R. III, second page 45). He visited "Haggen's Thriftway" which "was selling bread at far less than the prevailing market" (R. III, second page 44). Lalime *did all in his "power to persuade these people not to do so"* (R. III, second page 42), i.e., to stop price cutting. He also talked to the manager of "Clark's Supermarket" about price cutting:

A. I pointed out that a price war was very uneconomical, that it would be disastrous especially to a smaller operation, that any time these price wars started there was only one thing that happened and that was complete chaos. [R. III, second page 46.]

Robert Hall, partner in a bakery in Bellingham, testified that he had never been a member of Bakers of Washington, Inc., but had been solicited to join three times. Hall testified as to what he was told when he was asked to join Bakers of Washington, Inc., as follows:

Q. Were you ever solicited to become a member?

A. Yes, personally three times.

Q. When you were solicited, were any representations made to you as to the purpose of this organization?

A. Yes. It said to make better labor relations, *to maintain prices* and generally better baking conditions.

HEARING EXAMINER LYNCH: Who made these representations to you, Mr. Hall?

THE WITNESS: The Bakers of Washington Association.

HEARING EXAMINER LYNCH: I mean, that is a corporation; any particular individual?

THE WITNESS: I have heard his name but I cannot call him by name to my own knowledge. I have heard it, Mr. Lalime or whatever it is. [R. III-B, 464, emphasis added.]

In 1958, Bakers of Washington, Inc. was trying to persuade the owner of Hall's Bakery in Bellingham to raise his bread prices to the level of the rest of the bakers (R. III-B, 467). Hall testified under cross-examination by Continental that Lalime tried to get him to raise his prices:

Q. . . . Did Mr. Lalime ever tell you to get your prices up?

A. Mr. Lalime told me that, for instance, if Wonder Bakery cared to bring up bread in Bellingham and sell it as an unbranded loaf of bread for 10 cents a loaf, what would that do for your business?

Q. He never told you that Wonder Bakery was going to bring up 10-cent bread?

A. He did not say they were going to, he said: "What if they did?" [R. III-B, 468.]

The other partner of Hall's Bakery, R. L. Hall, testified that Bakers of Washington, Inc., advised him when price increases were going to take place (R. III-B, 476). On cross-examination by counsel for Continental he testified:

Q. I think I'm correct in understanding, sir, that you testified that Mr. Lalime had advised you of prospective price increases in Bellingham?

A. He had.

Q. And can you recall for us, sir, what his language was? Was he able to say to you in other words that as of a certain date the bakers are going to go up a certain price?

A. He did.

Q. Did he say that to you?

A. He did say that.

Q. Do you recall what he said precisely?

A. Well, this one time I believe he came in and he said that the price of bread is going to go up on such and such a date and was wondering what we were going to do about it. And I said, "Well, my brother

and I would have to talk it over and decide between us whether we would go up or whether we would stay where it was." [R. III-B, 482-83.]

And further:

Q. And do I understand you to mean by that that he thought you could get your prices more in line with the other retail prices of the Bellingham market?

A. As my memory of the conversation goes he said to me: "There are several of the other stores now that are getting 32 cents a loaf and we are wondering if you couldn't come up at least to meet those fellows at 32 cents." [R. III-B, 482.]

Victor H. Goethals, owner of "Fortune's Bakery" at Anacortes, testified that in 1958 he raised his prices because he was "*told to go up*" by Bakers of Washington, Inc., who contacted him telling him to raise his prices (R. III, second page 51). Goethals was a member of Bakers of Washington, Inc. (R. III, second page 53). This contact was by telephone call from the manager of Bakers in Seattle. Goethals, who was then selling his bread 2¢ lower than his competitors, was told to *put his bread price up with the rest of the wholesalers* (R. III, second page 51). Goethals testified that he then raised his bread price 2¢ because he did not want a repetition of the trouble with Bakers of Washington, Inc. that he had had in 1957 (R. III, second page 54-55). In 1957 he had been subjected to pressure to raise prices. Bakers of Washington, Inc. had harassed him to go along with a bread price increase which had just been put in effect in the area. Goethals testified:

Q. What trouble was that in 1957, will you describe it, please?

A. Well, quite a bit because I did not go up with the price at first and then after the pressure was brought on by Alford, I had to put my price up after everybody else had put the price up. [R. III, second page 55.]

Alford, as previously stated, was the secretary-manager of Bakers of Washington, Inc. who preceded Lalime. When Goethals was asked how Bakers could pressure him "out there" in Anacortes to raise his prices, he testified that the "machine bakeries" could undersell him and "break" him at any time (R. III, second page 55).¹³

Goethals received communications by mail from Bakers of Washington, Inc., telling him that bread prices were going to go up on a certain date. He testified on this point:

Q. The question was: Did you get mail from Bakers of Washington?

A. Yes, I did.

Q. And I asked you the subject matter of the mail, what did it say?

A. Saying that bread would go up on a certain date. [R. III, second page 54.]

Frank A. Maxeiner, who at the time of the hearings was a field representative for the Lutheran Bible Institute, had operated a Seattle bakery for about 21 years prior to April 30, 1960 (R. III-A, 281-282). He testified that he had been a member of Bakers of Washington, Inc., and that Harry Alford, then "secretary-manager" of Bakers had contacted him over the years by telephone *to tell him to raise his bread prices*. Maxeiner testified:

Q. Did you know Mr. Harry Alford when he was connected with Bakers of Washington?

A. Yes, I did.

Q. Now, during the time Mr. Alford was associated with Bakers of Washington, did he ever contact you with respect to impending price rises as to bread?

A. Yes, he called on the phone.

¹³ Lower prices in a market like Anacortes affect the business of the larger bakers such as Continental and Langendorf "tremendously." The Seattle manager of Langendorf testified to this effect (R. III-A, 317).

Q. And did this happen on several occasions?

A. Yes, it did over the years.

Q. Did he advise you as to an impending price rise in bread when he called?

A. Yes, *he would usually indicate that we were to advance the price of bread.* [R. III-A, 282, emphasis added.]

Instances of suppression of price-cutting on bread by members of Bakers of Washington, Inc. also occurred in Yakima. Vincent Kenneth Noga operated an in-store bakery in a supermarket at Union Gap near Yakima. In the summer of 1958 Noga reduced his price to 25¢ per loaf. He placed a sign in front of the supermarket with the price on it (R. III-B, 515). Noga's competition was Continental, Langendorf, Trennery's (later Holsum), Atkinson's Stores, Inc., Safeway, and others (R. III-B, 513). These companies were selling bread at the regular price of 33¢ per loaf (R. III-B, 514). Within a day of his price-cut (R. III-B, 516) Noga was visited by one of the owners of Snyder's Bakery, Inc., a "trustee" of Bakers of Washington, Inc., who told Noga to get his bread price back up, and to get in line with the rest of the bakeries. Noga was informed that a 1¢ differential was sufficient for his bread, and he should come up at least to 32¢ per loaf (R. III-B, 516). Noga related Snyder's message:

Well, he told me to get my bread up, to get it in line with the rest of them; that he figured if they let us have a penny that was sufficient; that I should come up to at least 32 cents. [R. III-B, 516.]

On an earlier occasion, in the fall or late summer of 1957 in Yakima, Wayne Atkinson, who operated the "Old Holland Bakery," ran an advertisement in the Yakima paper offering a weekend special of 21¢ on the one and one-half pound white loaf (R. III-B, 377). Atkinson's "Old Holland Bakery" was a member of Bakers of Washington, Inc. (R. III-B, 392). The price Atkinson had

previously been charging was 31¢ (R. III-B, 376). Atkinson was immediately visited by the owners of Snyder's Bakery, Inc., who asked him if he "was trying to break the price of bread" (R. III-B, 377, 379). The Snyders told Atkinson that they had had a telephone call from Safeway in Seattle about the low bread price (R. III-B, 382A).¹⁴ Atkinson testified:

Q. Whom did the Snyders say had called them from Seattle, did they say?

A. Yes, sir.

Q. And who was it?

A. Safeway.

After the visit from the Snyders, Atkinson raised his bread price to the original price before the reduction (R. III-B, 383).

3. The Commission was justified in finding that petitioners were parties to the price fixing activities engaged in by their association Bakers of Washington, Inc.

Continental, Langendorf, Hansen, and Buchan all held official positions in Bakers¹⁵ (R. IV, 1018), and bore a

¹⁴ This testimony was admitted by the hearing examiner "as to the Snyder's" (R. III-B, 381).

¹⁵ Petitioner Langendorf now claims the officials of Bakers of Washington, Inc., had no functions and the positions were mere "formalities" (brief, 19). As an example to the contrary, the president of Bakers, George B. Buchan, hired the association manager, Lalime, (R. III, second page 23), and Buchan's name was given to the applicants as the one to write to for an interview (R. III, second page 24). The hiring of the association manager (salary \$12,000 per year) shows that when necessary the officials of Bakers had "functions," and the jobs were not mere "formalities." Further, as another example of active conduct, Buchan and Hoyt, the association president and vice-president, went to Bellingham and with Lalime attempted to bring a price-cutting baker into line (R. III-B, 467-472). Authority for Bakers of Washington, Inc., actions was, of course, centered in its officers and trustees who were responsible for its affairs, including the supervision of the association's hired managers, Alford and after him Lalime.

proportionally larger burden of its financial support (R. III, 78). Petitioner Safeway likewise helped to defray the cost of Bakers of Washington, Inc., by paying its full-time manager an annual sum of \$600 (R. III, second page 32). As described, petitioners all attended meetings of Bakers regularly and frequently (R. III, 81-82; R. III-A, 225, 294, 315; R. III-B, 413-414). The president of Buchan "ordinarily" attended the Seattle meetings of Bakers at the Athletic Club (R. III-A, 225); he also attended divisional meetings in Takoma and Bellingham "on a number of occasions (R. III-A, 233). The president and owner of Hansen Baking Co. was "quite regular" in attending meetings (R. III-A, 294). The Seattle manager of Langendorf likewise attended "quite often" (R. III-A, 315). The Seattle manager of Continental also regularly attended meetings of Bakers (R. III, 81; R. III-B, 413-414), as did the Seattle representatives of Safeway, "usually" (R. III, 81).

Bakers of Washington, Inc. had functioned as the trade association of Continental, Langendorf, Safeway, Hansen, Buchan and other members of the baking industry for many years (R. IV, 1006-1009). The association, as noted, had employed the same full time manager, Harry Alford, for 20 years prior to November 15, 1957, when Arthur Lalime was hired after Alford's decease (R. III, second page 7). The record discloses that Bakers of Washington, Inc., and Alford, had engaged in the same type of activity in suppression of price competition in the sale of bread as Bakers of Washington, Inc. did with his successor Lalime.

Both Alford and Lalime, as managers, consistently acted to eliminate and suppress all price competition in the sale of bread in the geographic area where there were members of Bakers of Washington, Inc. They were energetic in securing adherence to price increases and to established prices. Lalime, who presided at Bakers of Washington, Inc. meetings, admitted his working "philosophy" against price competition ¹⁶ in the sale of bread:

¹⁶ Contrary to Continental's misleading statement (brief, 10), what is involved here is not merely a matter of Lalime's "personal

A. . . . I vehemently recommend no price wars because it is economic waste and very devastating to the industry.

Q. How do you do that. How do you convey that recommendation?

A. By every persuasion that I am capable of stating.

* * * *

Q. Then how do you convey your philosophy to the membership?

A. By personal contact.

Q. What is it you say to them?

A. I tell them that a price war would be very devastating to the industry. The demands that we have from labor are extremely difficult to live with without having a sick industry on top of it. [R. III, second page 41.]

Lalime thus conceded that as association manager he worked among petitioners Continental, Langendorf, Safeway, Hansen and Buchan against price competition. Lalime's activities involved such actions as, in the words of a small bakery owner in Anacortes, "[h]e said I should put the price of bread up with the rest of the wholesalers" (R. III, second page 51). When Harry Alford was manager of Bakers of Washington, Inc., he had also similarly contacted this small baker in Anacortes [R. III, second page 50.]

economic beliefs." Lalime was the key official of Bakers of Washington, Inc. He was hired by one of petitioners, was paid by petitioners and by Safeway, and presided over petitioners' regular meetings at which price fixing and price discussions took place. Lalime's determined opposition to price competition as the manager of petitioners' trade association is powerful and persuasive evidence of the price fixing conspiracy. *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 706. There the Court, referring to a letter of a "trustee" of the Cement Institute which commented that the cement industry "cannot stand free competition," stated:

The relevance of this statement indicating this Institute official's informed judgment is obvious.

The president of Buchan Baking Company, George B. Buchan, as noted, was one of the officers of Bakers of Washington, Inc., who had hired Arthur Lalime (R. III, second page 23). Safeway, which had paid Alford an annual retainer, continued such payment to Lalime (R. III, 80). Moreover, Richard Hoyt, an executive of petitioner Hansen and an official of Bakers as described, and George B. Buchan, were proven by this record to have journeyed to Bellingham and with the representative of Bakers of Washington, Inc., obviously Lalime, there to have acted to get local bakers to go along with a price increase, and to induce a price cutter to get "in line" (R. III-B, 467-471).

Lalime was very active. He visited the Bakers of Washington, Inc., division in Yakima 12 times a year (R. III, second page 38) or, in other words, approximately once every month. He visited the other divisions equally often (R. III, second page 39). Lalime thus, by his own admission, obviously worked by personal contact among members of Bakers in the divisions, as well as among petitioners attending Seattle meetings, to prevent, discourage and suppress price competition. His activities to suppress competition in Bellingham have been established in detail.

Petitioners unsuccessfully tried to elicit testimony from small bakery owners contacted by Lalime that they understood his price fixing activities were "on his own". Being unsuccessful in this attempt, petitioners now claim contrary testimony has no value (Cont. brief, 59). The owner of Hall's Bakery in Bellingham, under questioning by counsel for Continental, testified as to a visit of Lalime: "I couldn't say he was up there on his own, no . . ." (R. III-B, 480). Lalime came into this man's store and asked all about the "bread war," the reasons for it and who started it, and inquired about the "price that we had on the window" (R. III-B, 481). Lalime acted during the incident as the representative of industry members affiliated with Bakers, and was understood to be such:

A. Well, as far as I'm concerned, he asked me to do these things, I mean, he was asking me about them

and, of course, the only thing that I can go on, he was the representative for the Washington State Bakers Association and I had a talk with him and that's what he was there about. [R. III-B, 481.]

Another bakery owner, also under questioning by counsel for a respondent below, testified:

Q. Did you not just testify in response to Mr. Warnke's question that Mr. Lalime did not tell you that he was representing any particular person or anybody but himself?

A. How can he represent himself when he is working for the association?

Q. I wish you would answer my question, sir. [R. III-A, 276.]

Again on cross-examination by counsel for Continental a question was posed to a former supervisor of Albertson's Stores, Inc., suggesting that the manager of Bakers might have been acting "on his own" in his attempts to stop bread price cutting. This witness also refused to agree to this idea and, indeed, testified to the exact contrary:

Q. Now in your conversations with Mr. Lalime, with regard to this Bellingham retail price situation, did Mr. Lalime ever say that he was *acting for the wholesale bakers*?

A. *Yes, he did.* He didn't have to tell me. I know he is. [R. III-A, 270, emphasis added.]

Thus, Lalime held himself out as the representative of the Washington baking industry, including its leaders Continental, Langendorf, Safeway, Hansen and Buchan. Bakers of Washington, Inc., and its managers, Lalime and Alford, were understood by members of the baking industry to represent both "the wholesale people and the retail people" (R. III-A, 275). When a manager of Bakers told baking companies of price increases to institute, it was understood "that was his job" (R. III, second page 62).

The contention that hired managers, Lalime and Alford, of Bakers of Washington, Inc., would, on their own

initiative without authorization and indeed without even informing petitioners who, as officers and trustees of Bakers were their superiors, by personal contact, telephone and mail, tamper with bread prices and suppress price competition, and travel to towns like Bellingham, contacting bakers, securing adherence to price increases and stopping price deviations, cannot seriously be entertained. Even if this incredible situation existed, it is impossible to believe that Continental, Langendorf and Safeway did not know of such activities. Representatives of Continental, Langendorf, and Safeway could not have met with each other, with Lalime and Alford, and with their colleagues, petitioners Buchan and Hoyt, who participated with Lalime in suppressing price cutting, at small gatherings in an informal setting, many times in each year, without becoming aware of such activities. As the owner of a small Seattle bakery testified succinctly: "*we hear, you know, everything that goes on*" (R. III, 140).

The Commission rightly rejected petitioners' contention. The Commission found that petitioners knew or should have known of the price fixing activities of Bakers of Washington, Inc., and its officials, and had either affirmatively approved of those activities or acquiesced in them (R. II, 858). This finding was based upon compelling facts and circumstances in the record and upon inferences reasonably and properly drawable therefrom, not on "mere membership" in Bakers, as petitioners misleadingly suggest (Cont. brief, 57; Lang. brief, 32-33). Whether or not Lalime and Alford had been given specific authority to engage in activities to prevent price cutting, or to secure adherence to price increases, or were even told when hired not to do so, is beside the point. The fact is that they *did* engage in such activities, and the Commission found petitioners "knew or should have known"¹⁷.

¹⁷ Continental states there is no evidence that any of the wholesalers ever knew about price "flurries" among the "retailers" (brief, 58).

This is flatly incorrect because the evidence shows, as already set out, that Buchan and Hansen, the largest wholesalers in Seattle ex-

The complaint, moreover, charged petitioners with a combination and conspiracy with Bakers of Washington, Inc., and with Arthur Lalime, among others, to fix and tamper with bread prices. The evidence reviewed up to this point in this brief is ample to warrant the Commission's finding of such a combination between petitioners, Bakers of Washington, Inc., Lalime, and others. Meetings of petitioners, Bakers, and Lalime, at which prices were discussed and agreed to ("they decided that we should have a raise in our bread" (R. III-A, 260)) alone were sufficient to connect Lalime and petitioners in a conspiracy making his price fixing activities binding on all. *Continental Baking Co. v. United States*, 281 F.2d 137, 152 (6th Cir. 1960); *American Tobacco Co. v. United States*, 147 F.2d 93, 118 (6th Cir. 1944), *aff'd*, *American Tobacco Co. v. United States*, 328 U.S. 781 (1946). Insofar as Lalime's activities are concerned, there is no requirement in conspiracy law "that each defendant or all defendants must have participated in each act or transaction" making up the conspiracy. *Esco Corporation v. United States*, *infra*, 340 F.2d at 1006; *Eugene Dietzgen Co. v. Federal Trade Commission*, 142 F.2d 321, 331 (7th Cir. 1944), *cert. denied*, 323 U.S. 730; *American Tobacco Co. v. United States*, *supra*, at 118. A conspiracy, of course, creates an agency relation among its members, and every act performed by any member of the conspiracy in furtherance

cept for Continental and Langendorf, *helped to deal with a price cutting episode in Bellingham* involving small "retail" bakers (R. III-B, 467-473). Furthermore, the attempt to separate petitioners from the price fixing activities of Lalime by suggesting such activities occurred only among "retailers" is completely misleading. First, petitioners as wholesalers were vitally interested in retail prices as has been shown earlier in this brief. (pp. 11-14) Second, the evidence shows price enforcement wherever deviations occurred. As a small wholesaler testified, *Lalime told him to put his price up with the "rest of the wholesalers"* (R. III, second page 51).

Nor were the two price cutting episodes in Bellingham the only instances of price fixing activities by Lalime, as erroneously stated by Continental (brief, 59). The record is replete with many price fixing activities over a long period of time by Lalime, and Alford before him, involving communications to bakers to complain of price deviations (R. III-A, 255; R. III, second page 51) and to tell them to raise prices (R. III-A, 282).

of its purposes is the act of all members of the conspiracy. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 249 (1917); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253-254 (1940).

Safeway attempts to persuade this Court that it seldom attended meetings of Bakers, and hence was not at any meetings where price discussions and agreements took place (brief, 17-20). Safeway says the hearing examiner found the Safeway representative attended infrequently. From the structure of the hearing examiner's sentence, the statement has the appearance of a typographical error (R. I-A, 522). Be that as it may, Lalime, who presided at meetings, and to whom Safeway paid \$600 annually (\$50 a month), stated under oath that the Safeway "divisional bread man" *usually* attended Seattle meetings (R. III, 80).¹⁸ As the saying is, this witness "should know". This is the most credible testimony in the record on this point. The statement of the Continental representative is ambiguous, "not too" frequent attendance by Safeway (R. III-B, 446) which could, in fact, mean attendance frequently but not "too" frequently. Witness Schafer, who did not see Safeway at meetings, operated a bakery in Bellingham, only attending Seattle meetings himself "whenever it was convenient" (R. III-B, 488). Safeway offered no evidence on the point, or, like the other petitioners, at all for that matter.

On this state of the record, the Commission believed Lalime's testimony that Safeway "usually" was present (R. II, 861), and found as a fact that Safeway "regularly" attended (R. II, 856), and "participated in the Seattle price discussion meetings" (R. II, 858). The Commission's finding is supported by the most substantial evidence in the record, is reasonable, and was an exercise of the Commission's proper function as a fact finding body. *Federal Trade Commission v. Algoma Lumber Co.*, 291 U.S. 67, 73 (1934); *Stauffer Laboratories, Inc. v. Federal Trade Commission*, 343 F.2d 75, 79-80 (9th Cir. 1965). In addition to usual attendance by the Safeway

¹⁸ As distinguished from Safeway's "labor relations man".

"divisional bread man" at meetings of Bakers, and the regular payments to Alford and Lalime by Safeway, Safeway's participation in the conspiracy is revealed by other compelling evidence in this record. Thus, as described, a baker who was a member of Bakers of Washington, Inc., and who charged 2¢ less per loaf of bread than Safeway, testified that he received a telephone call from a person who identified himself as "a Safeway Store man" and was threatened, as follows:

. . . he told me that he was a Safeway store man and that the price of bread should be brought up there or else we would probably get in a bread war with them. [R. III-B, 479.]

Significantly this contact was made in connection with a price cutting episode in Bellingham, which Lalime was at that time attempting to suppress (R. III-B, 481). Safeway contends that the party on the other end of the telephone connection was not proven to be in fact a Safeway representative (brief, 28). Witness Hall, a Bellingham baker, testified unequivocally, however, that the caller identified himself as "a Safeway store man" (R. III-B, 478 and 479). The hearing examiner refused to reject his testimony (R. III-B, 479) and, lacking any indication whatsoever to the contrary, the Commission could in its discretion reasonably infer that Hall had in fact "received a threatening phone call from Safeway." Other tell-tale signs exist in this record, moreover, showing the use of the economic power of the big baking companies to frighten small price cutters. For example, Snyder's Bakery in Yakima, the owner of which was a "trustee" of Bakers of Washington, Inc., threatened Noga, a small baker:

. . . . And then he says "what would you do if we went down and had Safeway" he says, "now, they can meet competition, sell their bread for 15 cents or even 10 cents," he says "you know, you'd belly up." [R. III-B, 518.]

And Lalime, in attempting to bring a Bellingham baker in line, as already described, threatened him by asking

what would happen to his business if "Wonder Bakery" brought unbranded bread into his area for 10¢ a loaf (R. III-B, 468, see also R. III, second page 55). In sum, the Commission properly found Safeway part of the conspiracy. Even if the evidence were less convincing, it would still be sufficient because less evidence is needed to connect a particular defendant to a conspiracy than to establish the conspiracy in the first instance. *Isaacs v. United States*, 301 F.2d 706, 725 (8th Cir. 1962), *cert. denied*, 371 U.S. 818; *Hernandez v. United States*, 300 F.2d 114, 121-122 (9th Cir. 1962).

4. *The findings of the Commission were supported by substantial evidence, as they are in this proceeding, shall not be disturbed on review.*

It is submitted that a thoughtful consideration of this record permits no reasonable alternative to a conclusion that there was an actual agreement, a "meeting of the minds," or a tacit understanding, in short a "combination and conspiracy," among petitioners, Bakers of Washington, Inc., Lalime, and others to suppress price competition in the sale of bread. The Commission has so found, and it has long been settled that on review the weight to be given to the evidence, and the inferences to be drawn, are for the Commission to determine, not the courts. *Corn Products Co. v. Federal Trade Commission*, 324 U.S. 726, 739 (1945); *Federal Trade Commission v. Pacific States Paper Trade Association*, 273 U.S. 52, 63 (1927). The findings of fact by the Commission, including whether petitioners engaged in a price-fixing agreement, if supported by substantial evidence, are conclusive. *National Macaroni Manufacturers Association v. Federal Trade Commission*, 345 F.2d 421, 426 (7th Cir. 1965); *De Gorter v. Federal Trade Commission*, 244 F.2d 270, 272 (9th Cir. 1957). The reviewing court will not substitute its judgment for that of the Commission. *De Gorter v. Federal Trade Commission*, *supra*, 244 F.2d at 273; *Stauffer Laboratories, Inc. v. Federal Trade Commission*, *supra*, 343 F.2d at 79-80; *Federal Trade Commission v.*

Algoma Lumber Co., *supra*, 291 U.S. at 73. Nor does the possibility of drawing either of two inconsistent inferences from the evidence prevent the Commission from drawing one of them. *National Macaroni Manufacturers Association v. Federal Trade Commission*, *supra*, 345 F.2d at 427; *Standard Distributors v. Federal Trade Commission*, 211 F.2d 7, 12 (2d Cir. 1954); *Globe Readers Service, Inc. v. Federal Trade Commission*, 285 F.2d 692, 694 (7th Cir. 1961). As the Court said in *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 488 (1951):

Nor does it [substantial evidence] mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.

The substantial evidence upon which the Commission found an agreement, understanding and meeting of the minds among petitioners, Bakers of Washington, Inc., Lalime, and others to suppress price competition in the sale of bread is set out in detail in the Commission's Opinion (R. II, 817-866), and has been reviewed in this brief. As the hearing examiner put it, petitioners activities "add up" to a combination to "fix prices and compel adherence to them."¹⁹ It is believed the evidence supporting this conclusion is not only substantial on the whole record, but virtually conclusive. At the very least the comment of this Court in *Esco Corporation v. United States*, 340 F.2d (9th Cir. 1965) 1007, 1000, is appropriate:

¹⁹ It is significant that *four* out of the *five* persons who weighed the evidence in this record found a price fixing agreement among petitioners. This preponderance of judgment demonstrates that the evidence supporting the findings of price fixing is indeed substantial. Further, as the Court indicated in *Universal Camera Corp. v. National Labor Relations Board*, *supra*, 340 U.S. at 496-497, the initial findings of an experienced hearing examiner who heard the witnesses carry weight in judging whether there is substantial evidence on the record as a whole in support of the findings ultimately made by the administrative tribunal.

We do not say the foregoing illustration *compels* an inference in this case that the competitors' conduct constituted a price-fixing conspiracy, *including an agreement to so conspire*, but neither can we say, as a matter of law, that an inference of no agreement is compelled. As in so many other instances, it remains a question for the trier of fact to consider and determine what inference appeals to it (the jury) as most logical and persuasive, after it has heard all the evidence. . .

It has been long established that an exchange of words is unnecessary to find a conspiracy. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1948); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939). It is sufficient if there is a common design, understanding or meeting of the minds in an unlawful purpose. *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). In a similar rationale the Tenth Circuit in *Heald v. United States*, 175 F.2d 878, 881 (1949), *cert. denied*, 338 U.S. 859, stated:

. . . . conspiracies rarely, if ever, are established from direct evidence. Conspiracies by their very nature must generally be established in large part from conversations, admissions, conduct, and the natural inferences to be drawn therefrom, and it is sufficient if the circumstances, acts, and conduct of the parties are of such character that the minds of reasonable men can conclude therefrom that an unlawful agreement or understanding exists.

It scarcely needs stating that any tampering with the price structure through agreement whether it be to establish prices, to secure compliance with price increases, or to end price cutting by some members of an industry, is illegal *per se* and an unfair method of competition in violation of the Federal Trade Commission Act. *United States v. Socony-Vacuum Co.*, 310 U.S. 150, 218 (1940); *National Lead Company v. Federal Trade Commission*, 227 F.2d 825, 833-834 (7th Cir. 1955), *aff'd*, 352 U.S. 419 (1957); *Allied Paper Mills, et al. v. Federal Trade*

Commission, 168 F.2d 600, 605 (7th Cir. 1948), *cert. denied*, 336 U.S. 918.

In view of the substantial evidence of record in this case, the Commission was not required to accept the denials of petitioners that there was any concert of action, understanding, or meeting of the minds.²⁰ As the court said in *Advertising Specialty Nat'l Ass'n. v. Federal Trade Commission*, 238 F.2d 108, 115 (1st Cir. 1956):

. . . nor is the commission required to accept the denials of those charged with the conspiracy merely because there is no direct evidence to establish it, for it is well settled that "The essential combination or conspiracy may be found in a course of dealings or other circumstances as well as in any exchange of words." . . ."

Likewise in *Gerardi v. Gates Rubber Co. Sales Division, Inc.*, 325 F.2d 196, 200-202 (9th Cir. 1963), this Court noted a jury in a price fixing case was not "obliged to accept as true" the denials of those charged.

²⁰ It is obvious that in every contested case where price fixing was proven, those charged must have disclaimed it. Thus, Continental's suggestion (brief, 49, n. 1) that persuasive weight must be given to petitioner's denials is nonsense.

Surprisingly, the witness (Schafer) whose "unequivocal" testimony Continental says "buttressed" petitioners' denials actually gave testimony strongly probative of a price fixing conspiracy. He admitted that price discussions took place at Bakers of Washington, Inc. meetings. The essence of his testimony was that an agreement was reached by those present that they would have to "do something" about the price of bread or use "red ink" (R. III-B, 489). This shows unequivocally an understanding to raise prices. His answer that he did not "hear" an agreement (R. III-B, p. 489) obviously refers to an "exchange of words" which is not necessary to a conspiracy. Continental should derive little comfort from pages 499-500 (R. III-B, 499-500), also cited in its brief, 49, note 1. They contain such leading questions that in effect Continental, rather than the witness, testified with answers of no probative value. The earlier testimony of the witness shows that an "agreement" in his lay mind meant an "exchange of words" (R. III-B, 489). His earlier testimony also shows that the price "discussions" he heard at meetings, whether dubbed "general" or not, amounted to an unlawful understanding, or meeting of the minds, to raise prices.

5. *Petitioners' arguments that the Commission relied only on "conscious parallelism," and that the activities of their trade association involved only "labor negotiations" and "collective bargaining," are unfounded.*

Continental and Langendorf both attempt to create the impression in their briefs that the Commission based its finding of price fixing principally on price identity and simultaneous price increases (Cont. brief, pp. 48, 51-56; Lang. brief, 29-31). They then devote many words to knocking down this "straw man" by arguing that evidence of parallel pricing alone cannot be taken to prove a conspiracy. Continental writes that the price similarity "relied" on by the Commission is "explicable" by objective economic facts, and the inferences of unlawful conduct drawn "from this evidence" are improper. Langendorf announces that it "is well settled that 'conscious parallelism' in behavior is not *per se* conspiratorial conduct" (brief, 30).

This, however, is a completely false issue. The Commission was very clear that it did not base its findings of conspiracy on identical prices and simultaneous increases, standing alone. The Commission stated:

. . . . It should be noted at the outset that this is not a "conscious parallelism" case. It is a conspiracy case. [R. II, 841.]

The Commission discussed in great detail in its opinion the many evidentiary factors, apart from uniformity, which it concluded revealed a price fixing agreement among petitioners and others. These have been described. They include frequent gatherings of petitioners at Bakers of Washington, Inc. meetings at which price discussions took place and, in fact, where agreements were reached; price increases following such association meetings; the "personal contact" work of the association manager Lalime among the members of Bakers of Washington, Inc., and other members of the industry, against price competition. They include the activities of Lalime, his predecessor, and other officials of Bakers in suppressing in-

stances of price cutting. Such evidence goes far beyond "conscious parallelism." Cases such as *Cole v. Hughes Tool Co.*, 215 F.2d 924 (10th Cir. 1954), *cert. denied*, 348 U.S. 927 (1955), and *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954), cited by petitioners, have no pertinence because the Commission grounded its finding on far more than price uniformity and simultaneous increases in prices.²¹

Nor did the Commission "exaggerate" the price uniformity prevailing among Continental, Langendorf, Hansen and Buchan, as Continental claims (brief, 51). *Prices were identical* on the standard one and one-half pound loaf. Continental's own manager in Seattle testified that he *could not get a penny more for his bread* than competitors such as Langendorf, Buchan, or Hansen (R. III-B, 412). The president of Buchan testified that prices on the standard loaves were "very much" in line with competitors, they were "quite standard," *identical* as a general rule (R. III-A, 185, 194). That Safeway sold its own private label bread "Mrs. Wright's" in its supermarkets for 1¢ per loaf less than Continental, Langendorf, Hansen, and Buchan is not inconsistent with the existence of an understanding among all petitioners to suppress price competition. A small differential between private label and brand name products is well known in our economy. See, e.g., *Federal Trade Commission v. Sun Oil Company*, 371 U.S. 505, 508 (1963). Moreover, as the president of Buchan Baking Co. (also president of Bakers of Washington, Inc.) testified, the other baking companies did not have the economic power to undercut Safeway (R. III-A, 195). Absolute price uniformity in any event is not a requisite of a price fixing agreement or understanding where the record otherwise contains substantial evidence probative of an unlawful understand-

²¹ In the latter case, the Court did not hold that evidence of "conscious parallelism" was inadequate to establish an agreement, but that such evidence did not "conclusively" establish an agreement. It was therefore held that the lower court was correct in submitting the matter to the jury. 347 U.S. at 541-542.

ing among petitioners. *National Lead Company v. Federal Trade Commission*, *supra*, 227 F.2d at 833-834; *Allied Paper Mills v. Federal Trade Commission*, *supra*, 168 F.2d at 607.

Petitioners label the bread price "discussions" that admittedly took place at meetings of Bakers of Washington, Inc., as merely "general discussions of economic conditions and price levels" occurring "in the context of labor negotiations" ²² (Cont. brief, 48-50). The characterization of such discussions as innocuous generalities, however, is contrary to the record. The point, of course, in any event is not whether such price discussions were "general" or specific, but whether they amounted to an agreement, understanding, or meeting of the minds to fix or tamper with bread prices, or constitute evidence tending to prove, when added to other evidence in the record, the existence of such an agreement, understanding or meeting of the minds.

In this respect, the "discussions" reveal quite clearly an unlawful understanding among petitioners to raise bread prices. Otherwise they certainly constitute evidence from which, along with other evidence in the record, an agreement, understanding or meeting of the minds may be inferred. For example, as already set out, the bakery supervisor of Albertson's Food Stores, a large supermarket chain, testified that in 1958 at meetings of Bakers of Washington, Inc. "*they decided*" that "*we should have a raise in our bread*" (R. III-A, 260). The assemblage then "kicked it around," discussing various prices. Contrary to petitioners' characterization, the "discussions" plainly were quite specific. Subsequently Continental, Langendorf, Hansen and Buchan all raised their bread prices the same amounts, effective the same day (R. IV, 1048, 1042, 1033, 1035, 1039, 1028-1029). Obviously exchanges such as this among competitors can-

²² Although Continental states (brief, 50) that Bakers of Washington, Inc. was formed "purely" for labor matters, such object was nowhere mentioned in its Articles of Incorporation (R. IV, 1000-03).

not be characterized as innocuous "general discussions of economic conditions and price levels." Likewise, an agreement among competitors at Bakers of Washington, Inc. meetings to "do something about the bread price" also goes far beyond any innocent "general" discussion of price levels or economic conditions (R. III-B, 489).

Price discussions among competitors at Bakers of Washington, Inc. meetings, moreover, cannot properly be segregated from the other price fixing activities of Bakers, its officers and its hired managers, Lalime and Alford. Thus, price discussions at meetings presided over by Lalime cannot, and should not, be considered apart from the efforts of Lalime to quell price competition among members of the baking industry. The incorrect, euphemistic description of the discussions as mere generalities is, of course, an attempt by petitioners to accomplish this result and to eliminate them from consideration as evidence of price fixing. It is elementary, however, that the evidence of a price fixing conspiracy is to be viewed as a whole, the integral parts thereof are not to be weeded out and examined separately. *United States v. Patten*, 226 U.S. 525, 544 (1913); *United States v. General Electric Company*, 80 F.Supp. 989, 1004 (S.D.N.Y. 1948).

In view of the unlawful character of the price "discussions" between petitioners, it is of no moment whether they occurred incidental to labor negotiations, or not.²³ Nevertheless, Continental's argument (brief, 49-50) that the price discussions occurred only as an incident to "collective bargaining," and "in resisting union demands" is factually contradicted by the evidence. Harry H. Schafer,

²³ *National Labor Relations Board v. Truitt Mfg. Co.*, 351 U.S. 149 (1956), provides no justification for price discussions and exchanges among competitors. That case merely held that an employer resisting a union demand for higher wages on the ground it could not afford to pay must substantiate such claim. Whatever may be justified in the way of price discussions in negotiations between an employer and a union, *Truitt* certainly provides no basis for price discussions between petitioners, and with other members of the baking industry.

the owner of a small wholesale bakery in Bellingham, who came down to Seattle and attended meetings when convenient, testified that the discussions of prices at Bakers of Washington, Inc. meetings occurred "after" the contract with the union had been signed, as well as before (R. III-B, 489). Obviously, evidence that price discussions took place among competitors *after* labor contracts had been signed is flatly at variance with Continental's contention that they only occurred during labor negotiations "in resisting union demands." Significant also in this connection is the testimony of the manager of Bakers of Washington, Inc. that not only did the Safeway "labor relations man" attend meetings, but also the Safeway "divisional bread man" was usually present (R. III, 80).

II. The Commission had jurisdiction over the price fixing conspiracy to which petitioners were parties.

1. Sales of bread to Alaskan customers f.o.b. dockside at Seattle were sales in interstate commerce, and subjected the challenged price fixing conspiracy to the jurisdiction of the Federal Trade Commission.

Petitioners Continental, Langendorf, Hansen and Buchan, sold bread regularly to customers in Alaska, f.o.b. dockside at Seattle.²⁴ Such sales of Langendorf, for example, were \$35,789 in 1960 (R. I, 250), and were made at "regular wholesale prices" (R. III-A, 344). Sales of bread to Alaskan customers f.o.b. dockside at Seattle were, of course, sales in interstate commerce. *California*

²⁴ In addition to such Alaskan sales other regular out-of-state shipments were made by Safeway and Snyder's Bakery, Inc. Safeway shipped bread from its Seattle plant to an adjoining state (R. I, 276) and Snyder, a wholesale baker in Yakima, sold bread to retailers in the State of Oregon (R. I, 177). On April 1, 1959, Trennery's Bakery Co. in Yakima was acquired by Holsum Baking Company. Thereafter all bread sold by Trennery's in Yakima was imported from Lewistown, Idaho (R. I-A, 368). Petitioners conceded in proceedings before the Commission that bread sold in Yakima was "in commerce" (R. III-C, 8, near end of volume; R. I, 189).

Rice Industry v. Federal Trade Commission, 102 F.2d 716, 718 (9th Cir. 1939); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 290 (1921); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 241 (1899); *Santa Cruz Co. v. Nat'l Labor Relations Bd.*, 303 U.S. 453, 463 (1937). Such sales, without more, subject the challenged price fixing conspiracy to the jurisdiction of the Federal Trade Commission. *Standard Container Mfg. Ass'n v. Federal Trade Commission*, 119 F.2d 262, 265 (5th Cir. 1941). Langendorf (brief, 16-17) and Safeway (brief, 14), however, argue that Alaskan sales were *de minimis*, and must be disregarded as interstate transactions in determining whether petitioners' price fixing activities in the State of Washington were "in commerce." Continental, on the other hand, simply ignores sales f.o.b. Seattle to Alaskan customers by stating incorrectly that "none of the bread manufactured [in Seattle] was sold outside the state" (brief, 15), and that "none of the bread subject to the alleged conspiracy is sold across state lines" (brief, 8). To be sure, only by disregarding sales to Alaskan purchasers are petitioners able to argue that sales in Washington of bread produced in Washington are wholly "intrastate," and that price fixing activities connected therewith are not "in" commerce and subject to the Federal Trade Commission. Illustrative of petitioners' Alaskan sales were those of Langendorf which, as stated, amounted to \$35,789 in 1960 (R. I, 250), and Hansen's which were about \$30,000 annually (R. III-C, 54 near end of volume).

The amount of interstate commerce involved is not material to a determination whether a restraint of trade such as price fixing is actionable under the antitrust laws. In *United States v. Socony-Vacuum Oil Co.*, *supra*, 310 U.S. at 225, the Court commented in assessing a challenged restraint:

. . . the amount of interstate or foreign trade involved is not material (*Montague & Co. v. Lowry*, 193 U.S. 38), since § 1 of the Act brands as illegal

the character of the restraint not the amount of commerce affected.

In fact, as early as 1903 in the *Montague* case, cited in the foregoing quotation, the Supreme Court was confronted by a claim that the amount of interstate commerce involved in an alleged restraint was "negligible," being *less* than 1% of the business of defendants. The Court rejected this argument, remarking that the amount of trade in a commodity was not "very material" in determining whether there was a restraint of interstate commerce. 193 U.S. at 46. More than fifty years later, in *United States v. McKesson & Robbins*, 351 U.S. 305, 310 (1955), the Court reiterated this position, stating:

It makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; *whether the amount of interstate commerce affected is large or small*; or whether the effect of the agreement is to raise or lower prices. [Emphasis added.]

See also: *Patterson v. United States*, 222 Fed. 599, 618 (6th Cir. 1915), *cert. denied*, 238 U.S. 635 (extent of interstate trade immaterial, no act of interstate commerce not protected); *Steers v. United States*, 192 Fed. 1, 5 (6th Cir. 1911) (no justification for view that a restraint can be permitted because volume of interstate traffic is not great); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 485 (1939) (amount of interstate commerce not test of violation); *Louisiana Farmers Protective Union v. Great A & P Tea Co.*, 131 F.2d 419 (8th Cir. 1942) (it is the character of restraint denounced by antitrust laws, and the amount of interstate commerce involved is not material); *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 611 (1952) (unreasonable restraints are banned irrespective of the amount of commerce involved); *Denison Mattress Factory v. Spring-Air Company*, 308 F.2d 403, 411 (5th Cir. 1962) (price fixing is in violation of the

antitrust laws whether the amount of commerce affected is large or small); *United States v. National Retail Lumber Dealers Ass'n*, 40 F. Supp. 448, 458 (D. Col. 1941) (the extent of interstate trade conspired against is immaterial, conspiracy to restrain single interstate shipment is within Act); *United States v. Learner Company*, 215 F. Supp. 603 (D. Hawaii 1963) (a conspiracy to fix prices is a *per se* violation if it affects interstate trade, amount of interstate trade is immaterial); and *United States v. Yellow Cab Co.*, 332 U.S. 218, 225 (1946), where the Court stated:

But the amount of interstate trade thus affected by the conspiracy is immaterial in determining whether a violation of the Sherman Act has been charged in the complaint. Section 1 of the Act outlaws unreasonable restraints of interstate commerce, regardless of the amount of the commerce affected.

Section 5 of the Federal Trade Commission Act minimally registers all violations of the Sherman Act. *Times-Picayune Pub. Co. v. United States*, *supra*, 345 U.S. at 609. The amount of interstate shipments, once such shipments have been established in fact, is thus likewise immaterial to jurisdiction under Section 5.

Furthermore, it cannot be said as a factual matter that \$35,789 of annual sales by Langendorf or \$30,000 of sales by Hansen directly "in" interstate commerce to Alaska, as well as comparable Alaskan sales of Continental and Buchan, were insubstantial, insignificant, or in any sense *de minimis*. In fact, the Commission found the opposite, that such sales were not *de minimis* (R. II, 821).

Langendorf states that petitioners did not have "a sufficient interest in the Alaskan market to have caused them to conspire to raise prices in that state" (brief, 17). The implication of this presumably is that sales of bread to Alaska f.o.b. dockside at Seattle were "outside" the alleged price fixing conspiracy, and jurisdiction cannot be based thereon. Continental also implies this argument by stating incorrectly (brief, 8) that "none of the bread subject to the alleged conspiracy is sold across state lines."

That the price fixing activities of Continental, Langendorf, Safeway, Hansen, Buchan, and Bakers of Washington, Inc. did not control the retail bread price in Alaska does not mean that sales to Alaskan purchasers f.o.b. at Seattle were "outside" the conspiracy. Alaskan sales were made by petitioners at their "regular wholesale prices" (R. III-A, 344). Obviously the price fixing activities of petitioners protected the price at which such sales were made just as such activities protected petitioners' bread prices to customers in Washington. Deterioration of prices in Washington would, of course, have meant a decline in the price petitioners obtained for their f.o.b. dockside sales at Seattle. Conversely, a cut price extended to Alaskan purchasers at the dock would have undermined the price structure with respect to petitioners' sales to customers in Washington. Hence, petitioners' sales f.o.b. dock at Seattle to purchasers in Alaska were sales "in" commerce at prices affected, tampered with, or inflated by petitioners' price fixing activities, and were not "outside" the conspiracy.

2. Bread produced and sold within the State of Washington by integrated, multi-state corporations Continental, Langendorf and Safeway is sold in interstate commerce and any fixing of the price thereof is subject to the jurisdiction of § 5 of the Federal Trade Commission Act.

Petitioners concede that they are engaged in interstate commerce, but argue that the price fixing activities challenged by the Commission were in the "intrastate" phase of their operations.²⁵ As described, petitioners first eliminate their Alaskan sales as *de minimis*, and then argue that the challenged price fixing activities concerned only bread produced and sold within Washington, and are therefore outside the jurisdiction of the Commission

²⁵ Continental stipulated that it "is regularly engaged in interstate commerce in the sale and distribution of bread and other bakery products" (R. I, 304). See similar stipulation of Langendorf (R. I, 299) and of Safeway (R. I, 302-303).

(Cont. brief, 13-22; Lang. brief, 10-18; Safe. brief, 45). Continental, Langendorf, and Safeway, in this manner, seek to derive all the advantages of large-scale interstate operations, but at the same time to free themselves from the antitrust laws customarily applicable thereto.

Continental, thus, would have this Court, in considering its pricing practices in Washington, close its eyes to the fact that they are part of a massive interstate baking operation consisting of 69 bakeries in 65 cities in 32 states, which did \$410,642,000 in business nationally in 1960. From headquarters in New York Continental manages its far-flung operations on an integrated basis. Indeed, *Continental stipulated that each element of its bread and bakery business is part of an integrated whole* (R. I, 304-305). Continental concedes it is a single business entity and that, as such, it benefits or suffers from what is done in the State of Washington. It cannot be disputed that Continental from headquarters maintains close scrutiny and supervision over its entire multi-state operation, including, of course, supervision over sales, profits and prices of local plants such as those in Seattle. Under the president and his staff at New York, the company is divided into "regions," each under a "regional manager" responsible to the president for supervision of individual baking plants. The latter, headed by "plant managers," are responsible to the "regional managers" and finally to headquarters. Continental ultimately sells its bakery products, including bread, from its many plants by means of driver-salesmen. These Continental employees call on customers placing "Wonder Bread" on the shelves, collecting payments, and otherwise performing many essential tasks for the benefit of Continental.

Headquarters of Continental in New York has absolute authority over the entire Continental organization. Whatever operating procedures top management deems advisable may be instituted. Headquarters can determine in what geographic area any given plant will market its bread or, for that matter, can close any plant if it

wishes. Purchasing of raw materials is handled centrally in New York, and is done for the company as a whole (R. I, 305). Headquarters insists upon minimum standards of quality and guides production methods through production bulletins issued from New York. Regional supervision is also applied. All price changes by individual plants of Continental are approved by headquarters (R. IV, 1050-1071), and headquarters collects from its individual plants all money received from operations (R. I, 305). Continental's local plants have no control whatsoever over the money obtained from the sale of Continental's products. Personnel of Continental are shifted around the country from plant to plant, and from headquarters to regional office and plant, and vice versa. Headquarters, of course, may "fire" Seattle employees, as well as those at any level of Continental's organization, and has complete authority over them insofar as company business decisions are concerned.

There is thus a constant flow of communications, instructions, personnel, bulletins, reports, orders and so forth, between Continental headquarters, its regional offices, and local plants such as those in Seattle. Money from sales of bread and bakery products constantly flows out of the State of Washington back to the Continental treasury, and is disbursed in company operations and in dividends (R. IV, 1087). Funds likewise constantly flow from headquarters in New York to Seattle, and elsewhere, in payment for supplies for Continental's bakery products, and for other purposes.

The foregoing, of course, is not a complete enumeration of the manifold details illustrating the operation of Continental as a national interstate, integrated bakery business.²⁶ It serves only to emphasize the unreality of Continental's position that its business in Washington was merely "local," not in interstate commerce. This nar-

²⁶ Continental Baking Company in 1963 ranked as the 121st largest United States industrial corporation with sales of \$476,043,000. See Fortune directory, "*The 500 Largest Industrial Corporations*", August 1964, p. 6. Cf. *United States v. E. I. duPont*, 353 U.S. 586 (1957), n. 17.

row interpretation limiting interstate commerce in this proceeding to the sale of bread across state lines, however, is not even consistent with the earliest Supreme Court pronouncement as to the meaning of the word "commerce." In 1824 Chief Justice Marshall defined "commerce" broadly to include not merely physical movement of goods, but commercial *intercourse*. In *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 188 (1824), he stated:

Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.

Continental plainly is engaged in "commercial intercourse" among the states when it sells bread in the State of Washington.

There has been a consistent refusal by the Supreme Court to exclude from the jurisdiction of the antitrust laws "local" predatory practices, such as price fixing, on the basis of an alleged "intrastate" character, where such practices are carried out by great interstate businesses, or are part of an interstate combine. This has been true whether the conclusion of jurisdiction has been formulated in terms of an "effect" on interstate commerce, *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1948); *United States v. Frankfort Distilleries*, 324 U.S. 293 (1945), or on the basis of a determination that the "local" practices were "in" interstate commerce, as in *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944). It has also been true whether the action has been initiated under the Sherman Act or pursuant to § 5 of the Federal Trade Commission Act, *Federal Trade Commission v. Cement Institute, et al., supra*, 333 U.S. at 695-696, or under the Clayton Act, *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954).²⁷ In *Mead*, the Court held that local preda-

²⁷ Every trade restraint violative of the Sherman Act falls within the jurisdiction of § 5 of the Federal Trade Commission Act. *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 691-692

tory pricing of an interstate business was "within the scope of the antitrust laws." The Court refused to consider bread produced in New Mexico and sold in the New Mexican town of Santa Rosa as a thing apart from the business of the Mead company as a whole. Mead was one of several "interlocked companies," a member of an "interstate combine." The Court remarked that the beneficiary of the predatory pricing was an interstate business, that the money used to finance the price cutting was drawn from interstate commerce, and concluded that if the local pricing practices of Mead were exempted from the operation of the antitrust laws the "pattern for growth of monopoly would be simple."²⁸ In *South-Eastern*

(1948); *Federal Trade Commission v. R. F. Keppel & Bro.*, 291 U.S. 304, 310 (1934); *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643, 647 (1931). § 5 "minimally . . . registers violations of the Clayton and Sherman Acts." *Times-Picayune v. United States*, *supra*, at 609. With respect to trade restraints, such as price fixing, the Sherman Act and the Federal Trade Commission Act provide the Government with "cumulative" remedies. *Federal Trade Commission v. Cement Institute*, at 694. In the field of trade restraints, the "Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act, to stop in their incipency acts and practices which, when full blown, would violate those acts." *Federal Trade Commission v. Motion Picture Advertising Service Co., Inc.*, 344 U.S. 392, 394-395 (1953).

Consistent with these Supreme Court determinations, in a Sherman Act violation, such as price fixing, the jurisdiction of § 5 over interstate commerce must reach as far as that of the Sherman Act. Any other result would be anomalous, and contrary to the intention of Congress in passing the Federal Trade Commission Act to supplement the Sherman Act. In *Federal Trade Commission v. Bunte Bros., Inc.*, 312 U.S. 349 (1941), only the sale of "break and take" candy was involved, not a violation of the Sherman Act.

For jurisdiction in a price fixing case to be lacking merely because the proceeding was initiated under § 5 rather than by the Department of Justice under the Sherman Act would be contrary to the legislative purpose, and irrational. The policy and purpose of the Federal Trade Commission Act, in supplementing and bolstering the Sherman Act, must be considered in construing the powers given the Commission to function under it. *Federal Trade Commission v. Tuttle*, 244 F.2d 605, 615 (2d Cir. 1957), *cert. denied*, 354 U.S. 925 (1957).

²⁸ *Mead* is directly applicable to the instant proceeding. Continental, Langendorf and Safeway, multi-state businesses, were the

Undewriters the Supreme Court rejected an argument by large insurance companies, operating like Continental in many states, that insurance sales made locally were "intrastate." The Supreme Court said:

This business is not separated into 48 distinct territorial compartments which function in isolation from each other. Interrelationship, interdependence, and integration of activities in all the states in which they operate are practical aspects of the insurance companies' methods of doing business. [322 U.S. at 541.]

Further, the Court noted with specific reference to the technical claim that the sale of insurance was "local" and not interstate commerce:

But this reason rests upon a distinction between what has been called "local" and what "interstate," a type of mechanical criterion which this Court has not deemed controlling in the measurement of federal power. . . . We may grant that a contract of insurance, considered as a thing apart from negotiation and execution, does not itself constitute commerce. . . . But it does not follow from this that the Court is powerless to examine the entire transaction, of which that contract is but a part, in order to determine whether there may be a chain of events which becomes interstate commerce. Only by treating the Congressional power over commerce among the states as a "technical legal conception" rather than as a "practical one, drawn from the course of business" could such a conclusion be reached. [322 U.S. at 546-547.]

beneficiaries of "local" price fixing in Washington just as Mead was of the "local" predatory price cutting in New Mexico. If Mead could finance local price cutting from a central treasury, Continental, Langendorf, and Safeway had available at all times, *vis-a-vis* small Washington bakers, the intimidating power and resources of their multi-state businesses in furtherance of price fixing. Petitioners' out-of-state sales, moreover, seem to have been relatively greater, if anything, than Mead's few sales in Texas from its plant in New Mexico.

The Court decided that an interstate business was not deprived of its interstate commerce character merely because it was built upon sales contracts which were "local." The business of insurance companies, culminating in a transaction between an agent and a member of the public, was viewed by the Court as a totality.

Similarly, the interstate bakery business of Continental must be viewed as a *totality*.²⁹ The production and sale of bread by the Washington plants of Continental could not have occurred and continued but for extensive interstate transactions. For example, if headquarters in New York stopped ordering and paying for flour for Continental's Seattle plants, they would obviously cease production. Exactly as in insurance sales, money collected by Continental from its bread sales in Washington flows back to a single treasury in New York. The channels and instrumentalities of interstate commerce including telephone, telegraph, mail and traveling agents were used to consummate "local" insurance sales the Court found to be in interstate commerce. Such are used no less by Continental in carrying on its "local" bread business in Washington. The multi-state character of Continental's coast-to-coast bakery business, including the massive use of interstate mechanisms, brings Continental's bread sales in Washington directly within the authority of *South-Eastern Underwriters*. The Commission did not "misread" this case as establishing that it has jurisdiction over "all acts" of every corporation in interstate

²⁹ In *Progress Tailoring Co. v. Federal Trade Commission*, 153 F.2d 103 (7th Cir. 1946), preliminary advertising was held by the Seventh Circuit to be inseparable from the "final" sale and subject to jurisdiction under § 5. In *Ford Motor Co. v. Federal Trade Commission*, 120 F. 2d 175 (6th Cir. 1941), cert. denied, 314 U.S. 668 (1941), the Sixth Circuit refused to consider practices in connection with car sales by local dealers apart from Ford's *total* business. The Court noted that if "separately considered" the sales by Ford's dealers were "intrastate," but when weighed with the interstate business of Ford there was a "close and substantial" relation to interstate commerce. See also *General Motors Corp. v. Federal Trade Commission*, 114 F.2d 33 (2d Cir. 1940), cert. denied, 312 U.S. 682 (1941).

commerce (Cont. brief, 15). The Commission made no such determination. On the contrary the Commission took great pains to emphasize that its finding of interstate commerce was grounded on the interstate commerce aspects of Continental's integrated, multi-state baking business, exactly as in *South-Eastern Underwriters* (R. II, 836):

We find that all of Continental's sales in the State of Washington were "in" interstate commerce. All of them involved a New York seller and a Washington buyer. Each of them was an indivisible part of a host of "transactions * * * [that] constituted a single continuous chain of events, many of which were multi-state in character, and none of which * * * could possibly have been continued but for that part of them which moved back and forth across state lines.

Continental and Langendorf mistakenly assert that *South-Eastern Underwriters* merely determined that insurance was a "commercial activity" subject to the Sherman Act. That *South-Eastern Underwriters* in fact stands for the principle, for which it was cited by the Commission, that "local" transactions are "in" interstate commerce where they are an indivisible part of an integrated, multi-state business is shown by a pronouncement of the Court itself. In *United States v. Shubert*, 348 U.S. 222, 226 (1954), the Court said:

A similarly liberal construction has been given the requirement of §§ 1 and 2 that the "trade or commerce" be "among the several states." Thus, in the *South-Eastern Underwriters* case, the requirement was satisfied by a "continuous and indivisible stream of intercourse among the states" involving the transmission of large sums of money and communications by mail, telephone and telegraph.

There is no significant difference between the interstate transactions utilized to sell insurance, and the interstate transactions utilized in Continental's national bread busi-

ness, including its bread sales in Washington. Continental's bread sales are an indivisible part of a "chain of events" extending from New York headquarters down through the Continental organization to the "local" driver-salesmen in Seattle. Continental's driver-salesmen do not deliver daily thousands of loaves of "Wonder Bread" in Seattle without the benefit of innumerable interstate transactions by the Continental organization. Conversely, as the Seventh Circuit said in *Holland Furnace Company v. Federal Trade Commission*, 269 F.2d 203 (7th Cir. 1959), *cert. denied*, 361 U.S. 928 (1960), in rejecting a claim, similar to that in this case, that predatory practices in connection with the "local" assembly and sale of furnaces were not in interstate commerce:

Without the sales, deliveries and installations made by Holland's salesmen and servicemen from its own warehouses its interstate business would cease. With those sales, deliveries and installations and measured by them Holland has a continuous interstate business reaching into forty-four states. [269 F.2d at 210.]

The multi-state business of Continental, obviously, would cease without the sales of its many local bread and bakery plants. Conversely, Continental's local plant sales would cease without myriad corporate activities directed from New York. With both Continental has, like Holland, a "continuous interstate business" reaching into thirty-two, or more, states.

Nothing in *Federal Trade Commission v. Bunte Bros., Inc.*, 312 U.S. 349 (1941), conflicts with the Commission's finding of jurisdiction in this case. *Bunte* was tried and decided entirely on the theory that § 5 gave the Commission jurisdiction over "break and take" candy sales in the State of Illinois which "affected" interstate commerce. The question whether a "Sherman Act" type of trade restraint with respect to "local" sales of an integrated, multi-state business was "in" interstate commerce subject to § 5 was not determined. *Bunte* is not in point in this proceeding.

Continental quotes language from the decision of this Court in *Hills Brothers v. Federal Trade Commission*, 9 F.2d 481 (9th Cir. 1926), *cert. denied*, 270 U.S. 662 (1926), that the Commission had no jurisdiction over commerce "wholly" within California. By citing this language, however, Continental begs the question. Continental is obviously not engaged in commerce "wholly" in Washington. In *Hills Bros.*, of course, this Court sustained the Commission order against vertical price fixing applicable to respondent's business in California and elsewhere, noting that the Commission had jurisdiction over commerce "interstate in its character," as is the case here.

Nor do "secondary line" price discrimination cases decided under the Robinson-Patman Act establish petitioners' contention that the Commission here lacks jurisdiction. Continental and Langendorf cite *The Borden Company v. Federal Trade Commission*, 339 F.2d 953 (7th Cir. 1964), and *Willard Dairy Corp. v. National Dairy Products Corp.*, 309 F.2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934 (1963). Continental also cites *Myers v. Shell Oil Co.*, 96 F. Supp. 671 (S.D. Cal. 1951), and *Lewis v. Shell Oil Co.*, 50 F. Supp. 547 (N.D. Ill. 1943). Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), however, forbids:

..... any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce.

The Federal Trade Commission Act, on the other hand, is less rigorous. It broadly proscribes in § 5 "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce." Section 2(a) accordingly has been construed as having three specific jurisdictional requisites, (1) that the company be engaged in

commerce, (2) that discrimination be in the course of interstate commerce, and (3) something more, viz., that either the favorable or the prejudicial purchase itself involve movement of goods across state lines, or deal with goods which have or will move interstate, or otherwise have significant interstate incidents.³⁰ *The Borden Company v. Federal Trade Commission*, *supra*. Thus under § 2(a) jurisdiction in secondary line price discrimination cases has been held not to extend to discriminations with respect to "local" purchases of products produced entirely within a state, even though defendant otherwise made interstate sales. Such facts, of course, would be wholly sufficient to confer jurisdiction over all phases, both intrastate and interstate, of a restraint of trade violative of § 5 of the Federal Trade Commission Act. *Standard Container Mfg. Assn. Inc. v. Federal Trade Commission*, 119 F.2d 262 (5th Cir. 1941). Likewise under § 5, as under the Sherman Act, jurisdiction would extend to "local" sales by a national concern of locally produced products because they are part of an indivisible stream of intercourse among the states, as in *South-Eastern Underwriters*.³¹ The difference in the jurisdictional treatment plainly derives from the differences in the statutory language.

³⁰ A broader interpretation, however, has been placed upon the commerce requirements under § 2(a) in "primary" line price discrimination cases. *Moore v. Mead's Fine Bread*, 348 U.S. 115 (1954). There, as described, the statutory jurisdictional requirements were held satisfied by the showing that the beneficiary of predatory price discriminations not moving across state lines was an "interstate combine." See *Foremost Dairies, Inc. v. Federal Trade Commission*, CCH 1965 Trade Cases § 71,500, n. 5. (5th Cir. 1965).

³¹ In *S. Klein*, 57 F.T.C. 1544 (1960), the Commission stated with respect to § 5:

It is well established that commerce among the states is not confined to transportation, but comprehends all commercial intercourse between different states and all component parts of such intercourse. Interstate communications for commercial purposes constitute commerce within the meaning of the Constitution. See *Associated Press v. N.L.R.B.*, 301 U.S. 103, 128 (1937).

Even under the Robinson-Patman Act, however, the courts have not been consistent in interpreting the jurisdictional requirements of 2(a). In *Shreveport Macaroni Mfg. Co. Inc. v. Federal Trade Commission*, 321 F.2d 404 (5th Cir. 1963), *cert. denied*, 375 U.S. 971 (1964), discriminatory advertising allowances were made only in connection with goods sold intrastate, entirely within Louisiana.³² *Shreveport Macaroni* contended that jurisdiction was lacking. The Fifth Circuit declined to adopt this narrow view, stating:

The discrimination here was in the course of interstate commerce. It ran from one engaged in interstate commerce to others engaged in interstate commerce. It favored interstate chain operators in their whole business including their intrastate competition with grocerymen in Louisiana in the sale of petitioner's products who were not offered allowances on proportionally equal terms. The allowances were effected through the utilization of interstate mechanisms. The power to regulate interstate commerce includes limiting "its employment to the injury of business within the state." [321 F.2d at 408-409.]

The Court thus found an "ample nexus to interstate commerce." The price fixing conspiracy in the instant case, of course, "ran" between companies engaged in multi-state operations. Petitioners, furthermore, utilized interstate mechanisms in marketing bread within Washington. Nor can it be questioned that price fixing on bread was an injury to business within Washington.

Langendorf cites the decisions of this Court in *Page v. Work*, 290 F.2d 323 (9th Cir. 1961), *cert. denied*, 368 U.S. 875 (1961), and *Las Vegas Merchant Plumbers Ass'n. v. United States*, 210 F.2d 732 (9th Cir. 1954), *cert. denied*, 348 U.S. 817 (1954). Petitioners, however, should derive no comfort for their jurisdictional contention from these decisions. Both cases involved alleged

³² Contrary to Continental's assertion (brief, 20) all the goods on which *Shreveport Macaroni* paid discriminatory allowances were shipped to purchasers in Louisiana.

antitrust violations by *local* firms engaged only in *local* business operations. *Page* concerned legal advertising in purely local newspapers in Los Angeles which specialized in printing legal notices. Obviously, none of the parties were engaged, as petitioners are, in large scale integrated operations transcending many state boundaries. *Las Vegas Merchant Plumbers Ass'n.* similarly concerned a price fixing conspiracy of local plumbing contractors. Again none of the companies involved conducted widespread interstate businesses, and jurisdiction was based on an effect on the flow of plumbing supplies from out-of-state.³³

Nor does *Lieberthal v. North Country Lanes, Inc.*, 332 F.2d 269 (2d Cir. 1964), add anything to petitioners' argument. Again, neither interstate movement, the substantial utilization of the channels of interstate commerce, nor an indivisible stream of intercourse among the states was involved. *American News Co.*, 58 F.T.C. 10 (1961), likewise gives no support to petitioners (Lang. brief, 13-14). *American News* claimed that its purchases from wholesalers who broke up packages of magazines, repacked and resold them, were "intrastate" transactions not subject to the Commission's jurisdiction. The Commission rejected this argument on the merits, but also noted that jurisdiction over the challenged practices, wherever employed, existed in any event on the basis of activities in the District of Columbia. See *Standard Container Mfg. Ass'n. v. Federal Trade Commission*, 119 F.2d 262 (5th Cir. 1941). On review, however, the Second Circuit summarily dismissed the claimed reason for lack of jurisdiction holding that "the use of the bargaining

³³ Langendorf's quotations (brief, 17-18) from *Page* and *Las Vegas* refer to the requirement of substantiality where jurisdiction is predicated on an effect on interstate commerce under the Sherman Act. Where jurisdiction is based on actual sales across state lines as, for example, petitioners' Alaskan shipments, the amount of such shipments is immaterial. *United States v. Socony-Vacuum Oil Co.*, *supra*, 310 U.S. at 225; *United States v. McKesson & Robbins*, *supra*, 351 U.S. at 310, and other cases cited earlier in this brief.

power of an interstate chain of newstands to secure promotional rebates from giant interstate publishing firms" was within the jurisdiction of § 5. *American News Co. v. Federal Trade Commission*, 300 F.2d 104, 108 (2d Cir. 1962), *cert. denied*, 371 U.S. 824 (1962).

Continental refers to past litigation involving large companies (brief, 19), and argues that such cases were wrongly decided or could have been disposed of summarily if the Commission's "simplified" view is good law. The short answer to this contention is that it is possible to predicate jurisdiction on more than one basis. The conceptions relating to interstate commerce, furthermore, are not immutable, fixed for all time. *United States v. Swift & Company*, 196 U.S. 375 (1905); *Chicago Board of Trade v. Olsen*, 262 U.S. 1, 35 (1922).

If "local" price fixing by Continental is exempted from the antitrust laws the pattern for price fixing is simple in the baking industry, and in other industries where the nature of the product requires local manufacture and distribution. Bakery products including bread are highly perishable. Bread, to be considered acceptably fresh by the consuming public, must be sold within approximately 48 hours after baking. Bread and bakery products are also bulky in relation to their weight, thus making long distance transportation economically impractical. Hence, Continental establishes local plants near consuming centers in each of 32 states, and sells in nearby markets. Continental's Seattle plant, therefore, markets its output, except for sales to Alaskan purchasers, within Washington. The same is true for the Seattle plant of Safeway, excepting shipments to its Portland operation, and for Langendorf's Seattle plant, also except for shipments to Alaska. Hence, fortuitously, because of the nature of the baking business, and the consequent existence of local plants, Continental, Langendorf and Safeway, under their interpretation of the law, are in position to fix prices in Washington, and escape, if challenged, on the ground they are beyond the jurisdiction of the Federal Trade Commission Act. The operation of the antitrust laws, social and

economic legislation of major importance to the nation, cannot depend upon such adventitious circumstances.

3. An unlawful conspiracy between petitioners, Bakers of Washington, Inc., and others, fixing the price of bread in the State of Washington, is an unfair method of competition in interstate commerce regardless of whether or not petitioners' bread sales in the State of Washington are considered to be in interstate commerce.

Counsel for Continental conceded at oral argument before the Commission that if the president of Continental in New York, and the president of Langendorf in San Francisco, conversed by telephone and fixed the price of bread in Seattle, the conspiracy would fall within the jurisdiction of the Commission. Counsel for Continental further conceded that if the president of Continental telephoned Continental's plant manager in Seattle and told him to get together with the Seattle manager of Langendorf and agree to stop price cutting on bread in Seattle, the conspiracy would likewise fall within the jurisdiction of the Commission.³⁴ Yet counsel for Continental takes the position that the Commission would not have jurisdiction if the Seattle manager of Continental and the Seattle manager of Langendorf get together in Seattle on their own initiative to accomplish the same result, even though it is clear that

³⁴ Counsel for Continental stated at oral argument before the Commission:

MR. SCHAFER: Mr. Chairman, if the president of Continental sits up in New York and calls up the president of Langendorf in San Francisco and says, "Come on, let's get our prices up in Seattle," there is no question in our minds that you would have jurisdiction.

CHAIRMAN DIXON: But if the president of Continental called up the manager of his plant in Seattle, and the president of Langendorf called up his manager in Seattle and said, "You two knothheads get together now," what would happen?

MR. SCHAFER: I quite agree that again you would have an act or practice of [sic] crossing a state line. [R. III-C, 21-22 near end of volume.]

both petitioners assume legal responsibility for acts of their plant managers in Seattle (R. I, 299, 304).

The erroneous aspect of this conception lies in the notion that Continental as a corporation can be fragmented. The fact is, however, that the alleged conspiracy involved Continental, Langendorf, and Safeway. It was not between segments or parts of those entities, or their Seattle plants. It makes no difference at what level Continental became part of the challenged agreement. The important consideration is that Continental entered it. As Continental admits, the Federal Trade Commission would have jurisdiction over the challenged price fixing agreement had the president of Continental telephoned his Seattle manager directing him to agree with his competitors as to Seattle bread prices. Conceptually it can make no change in this result if the president of Continental journeyed to Seattle and issued instructions on the spot to agree with competitors as to Seattle bread prices, or if Continental's Seattle officials did so in their own discretion.

An agreement involving Continental, Langendorf, and Safeway, who are engaged in the production and sale of bread on a national or regional basis, and Bakers of Washington, Inc., and other local concerns, to tamper with bread prices in the State of Washington comes fully within the scope of *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948). In the *Cement Institute* case, the unlawful conspiracy violative of § 5 of the Federal Trade Commission Act related to local pricing of cement by two Washington portland cement producers, Superior Portland Cement Company and Northwestern Portland Cement Company. Superior and Northwestern were both incorporated in the State of Washington and operated cement plants in the Puget Sound area. Except for some shipments to Alaska by Superior, cement produced by these companies was sold only within the State of Washington. Both Northwestern and Superior under these circumstances, relying on *Federal Trade Commission v. Bunte Bros.*, 312 U.S. 349 (1941), urged that the

Commission lacked jurisdiction over their alleged unfair practices concerning cement produced and sold only within the State of Washington. The Supreme Court rejected this argument, commenting:

The Commission would be rendered helpless to stop unfair methods of competition in the form of interstate combinations and conspiracies if its jurisdiction could be defeated on a mere showing that each conspirator had carefully confined his illegal activities within the borders of a single state. [333 U.S. at 696.]

Similarly in *Salt Producers Ass'n. v. Federal Trade Commission*, 134 F.2d 354 (7th Cir. 1943), the petitioner salt producers and their association, like the Washington producers in *Cement Institute*, insisted that the Commission had no authority to control an unlawful agreement relating to the "intrastate" activity of the production of salt. The Court of Appeals dismissed this contention, commenting:

The production of salt is a local transaction, but an *agreement* between many producers, of diverse citizenship, to limit their respective productions is an unfair method of competition *in* interstate commerce. [134 F.2d at 359.] ³⁵

Likewise, price fixing involving Continental, Langendorf and Safeway, all of whom operate on a multi-state basis from out-of-state headquarters, is "in" interstate commerce whether such agreement relates to or affects prices within one state, or within several.

³⁵ In *California Rice Industry v. Federal Trade Commission*, 102 F.2d 716 (9th Cir. 1939), the fixing of milling quotas among California rice producers was held to be intrastate on the authority of *Carter v. Carter Coal Co.*, 102 F.2d at 722-723. The *Carter* case, however, was later overruled in *Wickard v. Filburn*, 317 U.S. 111, 122 (1942).

III. Petitioners were accorded a fair hearing before the Commission.

1. *The Commission could properly take official notice of facts about Continental established in a simultaneous proceeding before the Commission.*

The Commission took official notice (R. II, 829-836) of certain facts about Continental's "overall operation" of its multi-state baking business which had been testified to by Continental's own officials, or were derived from Continental's own business records, in another case before the Commission in which Continental was the respondent.³⁶ *In the Matter of Continental Baking Company*, Dkt. 7630. The purpose of the Commission in officially noticing such facts was to demonstrate in specific detail the manner in which Continental conducted its integrated national baking business, and to show the basis for its finding that Continental's Washington bread sales were "in" interstate commerce.

³⁶ Contrary to Continental's assertion (brief, 47, also 38, 46), and that of Safeway (brief, 44), the Commission found no "fatal gaps" in the record in this case making it legally insufficient to sustain a finding of interstate commerce based on Continental's integrated multi-state baking operation of which Washington sales were an indivisible part. On the contrary, the Commission affirmatively found that the record showed "the broad contours of the taut strings that tie the Seattle plant manager to his out-of-state employer in New York" (R. II, 829).

Continental stipulated (R. I, 304-305), among other things, that its coast-to-coast baking business was conducted on an integrated basis, that purchasing was done at headquarters in New York, that all receipts went into a single treasury, that ultimate responsibility for company affairs was centralized in New York, that *each element of its bread and bakery business was part of an integrated whole*, that Continental was a single entity, that Continental benefited by what was done by its individual bakeries and its local officials, such as those in Washington, that New York headquarters of Continental approved membership in Bakers of Washington, Inc. Local Continental officials, of course, only exercise authority delegated to them from New York. See also stipulation of petitioners Langendorf (R. I, 298-300) and Safeway (R. I, 301-303). Official notice added details to such basic evidence in itself sufficient to sustain jurisdiction.

Continental, and all other petitioners, none of whom had offered any evidence whatsoever prior to the Commission's opinion, were, in accordance with § 7(d) of the Administrative Procedure Act, 60 Stat. 241, 5 U.S.C. § 1006(d), given a full opportunity to rebut the facts officially noticed. Nevertheless, Continental claims the taking of official notice was error, and that the noticed facts were "disputed."³⁷ Langendorf, Hansen and Safeway argue that they were denied a "full and fair" hearing because they were not "parties" in Dkt. 7630. The latter contention, of course, ignores the full opportunity to rebut the noticed facts offered by the Commission, and which neither Langendorf, Hansen nor Safeway chose to accept.

Official notice and judicial notice are not the same thing. Prof. Davis in an article "Official Notice" in 62 Harv. L. Rev. 537 (1949), states:

³⁷ The Commission stated (R. II, 830, n. 10) that the facts noticed from Dkt. 7630 were "undisputed" by Continental in that proceeding. Continental concedes this (brief, 39). By claiming that the Commission noticed "disputed" facts Continental evidently refers to the testimony of its officials on remand that the sale of bread in Washington was a "local sales effort," which Continental regards as controverting the broad thrust of the noticed facts. In the vast majority of particulars, however, Continental did not controvert the facts noticed by the Commission. This aspect is discussed later. See R. II, 986-999. Indeed, Continental concedes that it did not try to "negative" each fact noticed by the Commission (brief, 23), but tried to show that the sale of bread was a "local business."

Of course, even if the sale of bread in Washington were a "local business" dependent on "local sales effort," this would not alter in the slightest the fact that, like insurance sales, Continental's Washington bread sales were *also* an indivisible part of a host of transactions crossing state lines in the conduct of a national, integrated baking business.

Continental erroneously states that the noticed facts from Dkt. 7630 were "never in issue" in that proceeding (brief, 39). This is not correct. The hearing examiner in that case specifically found Continental's "local" sales in New Jersey to be "in" interstate commerce because they were part of a chain of Continental transactions crossing state lines. See Initial Decision, Dkt. 7630, p. 42, and pp. 34-42. Dkt. 7630 involved the same jurisdictional dispute as exists in this case.

The customary assumption that official notice is merely the administrative counterpart of judicial notice and should therefore be governed by essentially the same principles is fundamentally unsound and causes much harm.

Official notice derives from § 7(d) of the Administrative Procedure Act, as follows:

(d) RECORD.— . . . Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

Official notice is broader than judicial notice. The committee on administrative procedure appointed by the Attorney General stated that under § 7(d) official notice should not be limited to the traditional matters of judicial notice. *Administrative Procedure In Government Agencies*, Senate Doc. No. 8, 77th Cong., 1st Sess., pp. 71-73 (1941). In 1947 the *Attorney General's Manual on the Administrative Procedure Act* reiterated the principle that the scope of § 7(d) was broader than judicial notice (p. 80).

The Commission in this case observed the provisions of § 7(d) *to the letter*. First, the Commission spread on the record every fact about Continental it was officially noticing (R. II, 829-836). Second, Continental, and all other parties were offered an opportunity to "show the contrary" of every fact noticed³⁸ (R. II, 829-831, n. 10). The record in this case was reopened (R. II, 877) on Continental's motion specifically to allow Continental an opportunity to "show the contrary." Any petitioner could have had such an opportunity, but no party except Continental sought one. Third, the Commission analysed the contentions of Continental, and gave particular emphasis to the

³⁸ An opportunity to "show the contrary" of officially noticed facts is specifically provided for in the Commission's Rules of Practice For Adjudicative Proceedings. 16 C.F.R. (Supp. 1965), § 3.14 (d).

question whether or not, or in what respects, Continental might have shown the contrary of the noticed facts.

Continental was, of course, a party in Dkt. 7630. The facts noticed about Continental were of the kind the Commission could have noticed, at least as to Continental, even without granting an opportunity to "show the contrary." In *Crichton v. United States*, 56 F. Supp. 876 (S.D.N.Y. 1944), *aff'd* 323 U.S. 684 (1944), the Interstate Commerce Commission had made a finding in one proceeding that a motor carrier was "able properly to perform the service proposed." There was no evidence supporting this in the record. The Commission, without giving an opportunity to rebut, relied on another proceeding, recently conducted for it, for facts to support the finding. In rejecting a claim of error, the District Court wrote:

Plaintiffs here were parties to the consolidation proceeding; and the course followed was proper and expedient. We have lately upheld the power of a court to take judicial notice of its own records, *Nahtel Corp. v. West Virginia Pulp & Paper Co.*, 2 Cir., 141 F.2d 1, *Goldstein v. Groesbeck*, 2 Cir., 142 F.2d 422, citing *National Fire Ins. Co. of Hartford v. Thompson*, 281 U.S. 331, 50 S. Ct. 288, 74 L.Ed. 881 which collects the Supreme Court cases; and the Commission is an administrative body not limited by as strict rules of evidence as control the courts. *Interstate Commerce Commission v. Louisville & N.R. Co.* 227 U.S. 88, 93, 33 S. Ct. 185, 57 L.Ed. 431. Further, the intelligent functioning of the administrative process demands that the Commission be not required to indulge in lengthy evidentiary recapitulations of matters just decided in a companion case. [56 F. Supp. at 880.]

See also *United States v. Pierce Auto Lines*, 327 U.S. 515, 528-530 (1945); *Paramount Cap Mfg. Co. v. Nat'l Labor Relations Board*, 260 F.2d 109, 113 (8th Cir. 1958); *Pittsburgh Plate Glass Co. v. Nat'l Labor Relations Board*, 313 U.S. 146, 157-158 (1940); *Yee Chun v. Nagle*, 35 F.2d 839, 840 (9th Cir. 1929).

It is, moreover, well settled that a regulatory agency in making its decisions has the right to take official notice of reports filed with it by a regulated company. *P. Saldutti & Son v. United States*, 210 F. Supp. 307, 313 (D. N.J. 1962); *Dance Freight Lines, Inc. v. United States*, 149 F. Supp. 367, 372 (E.D. Ky. 1957); *State of Wisconsin v. Federal Power Commission*, 201 F.2d 183, 186-187 (D.C. Cir. 1952), *cert. denied*, 345 U.S. 934. The testimony of Continental's officials, and Continental's own records, are obviously in a similar category.

Indeed, the facts noticed about Continental from Docket 7630 could properly have been noticed by the Commission under the traditional principles of "judicial notice." A tribunal in its discretion on considerations of expediency and justice, may take notice of its own records in other proceedings. *National Fire Insurance Co. v. Thompson*, 281 U.S. 331, 336 (1930); *Bienville Water Supply Co. v. Mobile*, 186 U.S. 212, 217 (1901); *United States v. Pink*, 315 U.S. 203, 216 (1942); *Kithcart v. Metropolitan Life Ins. Co.*, 88 F.2d 407, 411 (8th Cir. 1937); *Lowe v. McDonald*, 221 F.2d 228, 230 (9th Cir. 1955); *Paramount Cap Mfg. Co. v. Nat'l Labor Relations Board*, *supra*, 260 F.2d at 113.

Continental's reliance in objecting to official notice upon quotations from Prof. Davis (brief, 42-43) distinguishing between "adjudicative" and "legislative" facts is misplaced. The facts about Continental in the record in Dkt. 7630 were not in the category of "adjudicative" facts Prof. Davis thought should be introduced directly through witnesses or documents. Continental (brief, 43) conveniently does not continue Prof. Davis' quotation. Prof. Davis went on to explain the sort of "adjudicative" fact he had in mind:

For instance, on the disputed question whether the tavern licensee sold beer to a minor, the agency should clearly not be allowed to interview witnesses outside the hearing room. [2 Davis at 403.]

There is no question, of course, in this proceeding of the Commission utilizing official notice for any such *ex*

parte procedures. Prof. Davis, in fact, approves of official notice of "adjudicative" facts in many situations. The key consideration is the chance to "meet" the noticed facts. If an opportunity to rebut the facts noticed is granted, official notice is proper. 2 Davis 403. Thus, concerning the above tavern licensee he states:

On the question of the practice of competitors of the licensee, relevant to the issue of whether the license should be revoked or whether it should be suspended for a short period, the reasons for record evidence are much weaker, so that putting the facts into a proposed report would be reasonable thereby permitting the licensee to challenge through written or oral argument and to apply for a reopening of the hearing if he can demonstrate the need for rebuttal evidence or cross examination. [2 Davis 403.]

In *McDaniel v. Celebrezze*, 217 F. Supp. 952 (D. Md. 1963), official notice was taken of matter in a number of published medical texts, and of governmental studies of employment opportunities. The Court rejected a claim of error because an opportunity to rebut had been granted. Cf. *Glendenning v. Ribicoff*, 213 F. Supp. 301 (W.D. Mo. 1962), where no opportunity to rebut was given. Likewise, in *American Trucking Associations, Inc. v. Frisco Transportation Co.*, 358 U.S. 133 (1958), notice of internal agency practices was taken in a report to the Interstate Commerce Commission made after adjudicatory hearings had been concluded. At issue was the omission of operating restrictions in a certificate granted. The report took official notice for the first time of the agency's internal practices, and found the omission was the result of administrative mistake. The appellee motor carrier objected to notice of facts after hearings had been closed. The Court found no error because of the existence of an opportunity to rebut, saying:

But we fail to see what prejudice could have accrued from taking official notice of the practices, for appellee had adequate opportunity to rebut inferences

drawn from them on its argument to the Commission. [358 U.S. at 144.]

In *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 528 (1945), decided before official notice was specifically sanctioned by § 7(d), two different motor carriers made application to expand their routes. Competing carriers opposed both applications which were heard in separate proceedings by different boards. The Interstate Commerce Commission, however, did not consider each case exclusively on its own record, but utilized in each facts contained in the other. No opportunity to rebut was granted. On appeal the Court made clear that a chance to "meet" facts utilized from another record would obviate any question of prejudicial error. 327 U.S. at 528. In fact, the Court in *Pierce* even went farther and observed:

. . . the mere fact that the determining body has looked beyond the record proper does not invalidate its action unless substantial prejudice is shown to result. [327 U.S. at 530.]

Thus, even where no opportunity to show the contrary has been granted, official notice of facts outside the record would be wholly proper "in the absence of any showing of specific prejudice." 327 U.S. at 529. Obviously no specific prejudice can be present where Langendorf, Hansen and Safeway, as well as Continental, were told in meticulous detail the facts noticed about Continental from Dkt. 7630, and given an unfettered opportunity to "meet" them.³⁹ Langendorf, Hansen and Safeway all quote from *United States v. Abilene & Southern Ry. Co.*, 265 U.S. 274 (1924), that "nothing can be treated as evidence

³⁹ Langendorf, Hansen and Safeway all persist in arguing as if they had been denied any chance to meet the facts noticed. As is now obvious the opposite is true. Safeway, at another point, incorrectly suggests that the Commission limited the opportunity to show the contrary to "affidavits" (brief, 41). The truth is this proceeding was completely reopened (R. II, 877) permitting the fullest opportunity to "meet" the noticed facts by testimonial and documentary evidence, including the submission of briefs.

which is not introduced as such.” They then apply this excerpt literally, to condemn the use of official notice in this case. Such a result, of course, cannot be correct for it would destroy the specific authorization of official notice contained in § 7(d). Prof. Davis noted that the same language quoted by petitioners from *Abilene* was “loose” and a literal interpretation was probably not intended. 2 Davis 403, n. 8. The Attorney General’s Manual, moreover, at p. 80, states that the facts noticed under § 7(d) furnish the same basis for findings as evidence in the usual sense.

Continental’s contention that official notice here was error because it shifted the burden of proof is also untenable (brief, 41, 46). Again, if this argument were correct no official notice whatsoever would be permissible—an obviously untenable position. Official notice continues to be a vital procedure. *Brite Mfg. Co. v. Federal Trade Commission*, 347 F.2d 477 (D.C. Cir., 1965).

Petitioners also quote from *Western Sugar Refining Co. v. Federal Trade Commission*, 275 F. 725 (9th Cir. 1921). But there is no question in this case of holding petitioners without evidence. In *Kline v. United States*, 41 F. Supp. 577 (D. Neb. 1941), cited by Safeway, no chance to rebut had been given. This is the very opposite of the situation in this proceeding. In *E. B. Muller v. Federal Trade Commission*, 142 F.2d 511 (6th Cir. 1944), also cited by Safeway, the Commission did not disclose until its final decision the particular sales found to be discriminatory out of hundreds documented. Although the proceeding was not reopened, no prejudicial error was found despite the fact that the Court thought a prior disclosure should have been made. 142 F.2d at 519. The Sixth Circuit noted that under § 5(c) of the Federal Trade Commission Act petitioners could apply for a reopening, and that no denial of due process occurred if there was a failure to do so. If the failure to apply for a reopening obviates any question of denial of due process, *a fortiori* no error can exist where the case has ac-

tually been reopened, and an opportunity to "show the contrary" has been granted to all parties.

2. The Commission properly found that in most particulars Continental failed to show the contrary of facts officially noticed.

The facts about Continental noticed by the Commission in this proceeding are set out at R. II, 829-836. Continental on reopening called as witnesses eight of its officials. In an opinion issued December 3, 1964 (R. II, 986-999), the Commission concluded that the testimony of these Continental officials "affirms the essentials of the Commission's noticed findings as to Continental's organizational structure and general operational methods." In some particulars, however, the Commission found Continental had controverted noticed facts, and in a few instances the Commission did not accept Continental's claims. Contrary to suggestions in Continental's brief, however, the bulk of the noticed facts were not controverted.

No evidence from Continental's eight company witnesses contradicted the facts noticed under "A. Corporate Organization," "C. Purchasing," "F. Money collected from sales," "G. Accounting," "I. Insurance," "J. Engineering," or "K. Vehicles." Under "B. Territorial Assignments," Continental only challenged one statement of the Commission. Counsel for Continental read to its San Francisco regional manager the statement that the regional office "controls the territory to be served by each of the local baking plants," asking if the statement were true or false. The regional manager declared it false (R. III-C, 721). According to the regional manager the territory served by the Seattle plant is left to the "terrain" (R. III-C, 720). However, there is not, nor could there be, any contention that headquarters and the regional manager do not have authority to order the Seattle manager either to sell or not to sell in any given area. Superior authority in Continental, of course, has this power

and can exercise it whenever Continental's interests dictate. Testimony as to geographical factors and to local discretion does not controvert the existence of ultimate "control" in headquarters and the regional office.

Under "D. Production," none of Continental's eight company witnesses denied that Continental makes efforts to maintain rigid control of quality, and issues "Production Bulletins" prescribing production standards in exact detail. Nor did these Continental witnesses maintain that the San Francisco production supervisor was not "constantly in touch with the plants." The testimony of Continental's Seattle manager in effect was that headquarters held him responsible for the quality of "Wonder Bread" baked at the Seattle bakery, but that he could deviate from "Production Bulletins" where necessary to maintain quality. This testimony does not controvert the facts officially noticed under "D. Production." Plainly the existence of local responsibility does not contradict the insistence by headquarters and the regional office on a rigid standard of quality, nor the exercise of supervision over local plants as necessary to secure such quality.

Under "E. Pricing" Continental elicited testimony from the regional manager that he left complete control to the Seattle manager (R. III-C, 723). This testimony on remand is diametrically opposed to documentary evidence previously received in this proceeding and the Commission found it "wholly unpersuasive" (R. II, 991).⁴⁰ For example, in the case of the 1958 increase in the price of bread by Continental, the Seattle manager first wrote to the Continental regional manager in San Francisco *seeking approval* of a price increase. The Seattle manager wrote "*We would appreciate your approval of this change*" (R. IV, 1057). The San Francisco regional manager then

⁴⁰ Contrary to Continental's assertion (brief, 48) the Commission is not compelled to accept every statement of Continental's officials on remand, and abandon every fact when contradicted. Nothing in § 7(d) requires this, and the *Attorney General's Manual on the Administrative Procedure Act* (1947) at p. 80 clearly contemplates an evaluation by the agency of the "proof" offered where an attempt is made to show the contrary.

wrote New York headquarters, with a personal copy to the Continental president, *asking approval* (R. IV, 1055). At headquarters in New York, the president of Continental replied to the San Francisco regional manager, "This is our approval of the price increases" (R. IV, 1059).

In 1957 the Seattle manager wrote to the San Francisco regional manager:

To meet competition *would appreciate your approval* to increase price of small white from .21¢ to .22¢ and large units from .30¢ to .31¢. [R. IV, 1063, emphasis added.]

The San Francisco regional manager then wrote to the Continental president in New York headquarters asking approval (R. IV, 1061). The Continental "Director of Costs and Statistics" at headquarters sent a personal note to the president suggesting that "approval" of the 1958 price increase "should be issued from your office" (R. IV, 1050). In 1956 similar intracompany correspondence took place. The Seattle manager sought approval for the increase from the San Francisco regional manager (R. IV, 1071) who again passed the request to the Continental president in New York (R. IV, 1067). The latter responded with approval (R. IV, 1065).

Furthermore, during hearings in this case prior to reopening, the Seattle manager of Continental did not indicate in any way that price increases were unilateral decisions made by him. On the contrary, he referred to proposed increases as "suggestions" to higher authority, and spoke of receiving "approval" from above. See R. III-B, 411, and 426-427. Indeed, Continental's own counsel, in connection with the price authority of the Seattle manager, stated on the record during the original hearings in this case:

* * * I think that what he [Seattle manager] meant to testify to, your Honor, was that he writes a letter of recommendation to his regional manager and subsequently gets approval for a price change but that he did not mean to testify to, your Honor, that he

was able to say what goes on internally in Rye, New York. [R. III-B, 425.]

Thus the Commission was fully justified in rejecting the contention of Continental on remand that the Seattle manager had sole discretion over the price of "Wonder Bread," and in finding that Continental had not shown the contrary.⁴¹ The Court's statement in *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948) is appropriate:

* * * most of the witnesses denied that they had acted in concert in securing patent licenses or that they had agreed to do the things which in fact were done. Where such testimony is in conflict with contemporaneous documents we can give it little weight
* * *

The Commission found that Continental had shown the contrary of some facts noticed under "H. Personnel." The Commission concluded after reopening that "the Seattle plant manager does not need regional or home office approval to hire and fire 'department heads'." This does not mean, however, that Continental's personnel policies are a local matter. The Seattle manager was transferred there in February 1962, after more than four years with Continental in San Francisco (R. III C, 708-709). The sales manager in Seattle, at the time of remand, had held that position less than a year, having been transferred from production manager in San Francisco (R. III-C, 733).

As to facts noticed under "L. Sales," the regional manager claimed that each Continental plant manager under his supervision was responsible "for his own sales volume as well as his profits" (R. III-C, 725-726). But this does

⁴¹ No collateral estoppel was raised against Continental as to facts the Commission found were not rebutted (brief, 39-40). Collateral estoppel prevents relitigation between the parties of facts actually litigated and determined in a prior proceeding. *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948). Obviously the Commission did not "estop" Continental from attempting to show the contrary of noticed facts, but rather evaluated the "showing" made.

not "show the contrary" of the Commission's finding that the regional manager is held responsible by headquarters in New York for the "sales volume of the region as a whole" (R. II, 992, n. 7). The Continental regional manager's denial, however, if his testimony on reopening is so construed, of any responsibility for Seattle plant sales, as to which he is in a supervisory capacity, is contradictory to testimony of Continental in Dkt. 7630 (R. II, 834-835) as well as to obvious inferences from evidence in this proceeding. Denial of any responsibility for Seattle sales is inconsistent with the fact that the San Francisco regional manager has on his staff a "Regional Sales Manager," a "Regional Production Supervisor," a "Regional Cost Analyst," a "Regional Vehicular Supervisor," a "Regional Engineer," and a "Regional Personnel Director" (R. III-C, 718-719). If the Seattle plant, and the other local plants within the San Francisco region, "run themselves" the foregoing officials are functionless, superfluous, and erroneously titled, and the term *supervisor* in each title is meaningless. As a former regional sales supervisor, the Seattle manager agreed that he "spent a great deal of time here in Seattle" (R. III-C, 709). He had no hesitancy in acknowledging that the Continental regional manager in San Francisco was his "immediate supervisor," e.g., "*Mr. Hooks is my immediate supervisor. He is the regional manager*" (R. III-C, 710).

Under "M. Labor Relations," the Commission accepted the contention that the "labor relations man" at headquarters in New York does not participate in the negotiations of the Seattle plant's labor contracts. Contrary to the intimation in Continental's brief (p. 35), neither the Seattle manager nor the San Francisco regional manager denied that New York headquarters designs most of the wrappers and packages used by Continental. Essentially they only claimed on remand local discretion in using particular packages, but "it is all carefully checked through the legal department" at Continental headquarters (R. III-C, 683).

Nothing on remand was inconsistent with the few facts noticed under "N. Packaging." No testimony was elicited, of course, that the Seattle manager could refuse to use or revise the nationally known "Wonder Bread" wrapper shown on Continental's 1960 Annual Report (R. IV, 1076). And none of Continental's witnesses on remand denied the essentials of the facts noticed under "O. Advertizing." None denied that all major advertizing is handled from New York headquarters. They merely claimed some discretion in deciding how the Seattle plant's local advertising budget was to be spent (R. III-C, 695, 713-714), as distinguished from Continental's "mass media" advertising handled from New York, and authority to place local advertising (R. III-C, 786-787). But Continental did not contradict the noticed fact that virtually all of Continental's advertising is *placed* and *paid for* by headquarters in New York. Headquarters, of course, has "control," and can veto any advertising project proposed by the local Continental officials.

A general comment on Continental's contentions on remand is appropriate. By emphasizing, if not magnifying, the authority of local employees, Continental attempted to divorce its Seattle operation from its \$476,043,000 integrated national baking business. But neither the need for local sales effort to market bread nor the delegation by New York headquarters of authority to local employees can alter the fact that Continental's Washington sales are an inseparable part of Continental's multi-state business, and involve myriad transactions between headquarters, local plants and regional offices crossing state lines.

3. Chairman Dixon was not disqualified from participation in this proceeding.

On October 21, 1964, nine months after the Commission had issued its decision and opinion, Continental claimed for the first time that Chairman Dixon was disqualified from participation in this case (R. II, 902). The "basis" for this late claim of disqualification was Chairman

Dixon's participation over five years earlier on June 18, 1959, at a hearing before the Senate Subcommittee on Antitrust and Monopoly at which the president of Continental testified.⁴² Continental, although it has been litigating this case since April 14, 1961 (R. I, 11), suddenly decided that the "appearance of objectivity, impartiality and fairness would be lost" unless Chairman Dixon were disqualified (R. II, 905). Chairman Dixon refused to disqualify himself, stating that he had made "absolutely no prejudgments of any kind in this case," and harbored "no biases of any sort against Continental." Full consideration was given to Continental's "appearances" argument, but no valid reason for withdrawal was found (R. II, 913-922).

In the first place, Continental's motion to disqualify was not timely. At no time between the issuance of the hearing examiner's decision on July 20, 1962 (R. I-A, 515-550) and the Commission's decision on the merits on February 28, 1964, did Continental raise any question about "appearances" or Chairman Dixon's "objectivity, impartiality and fairness." On the contrary, Continental prosecuted its appeal, filed its briefs, argued orally to the Commission with Chairman Dixon participating (January 9, 1963), and awaited the Commission's decision without any suggestion that events in 1959 disqualified him.

In *Marquette Cement Mfg. Co. v. Federal Trade Commission*, 147 F.2d 589 (7th Cir. 1945), *aff'd.*, *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 700 (1948), a year after the taking of testimony had been concluded, Marquette "asserted for the first time that the Commission had prejudged the issues." Five months later, at oral argument, Marquette formally charged that the Commission was disqualified. The Commission, however, refused to disqualify itself citing among its reasons

⁴² "Study of Administered Prices in the Bread Industry," Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, U.S. Senate, 86th Cong., 1st Sess., pursuant to S. Res. 57 (Part 12, 1959).

that the motion was not made in apt time. The Seventh Circuit sustained the Commission stating:

* * * we think the Commission could not be disqualified in the manner attempted, but assuming it could be, *we are of the view that the attempt to disqualify was made too late.* [147 F.2d at 592, emphasis added.]

In this proceeding Continental's motion was far more untimely.

Nor is there any merit to Continental's claim that the alleged "basis" arose for the first time on remand. The questions addressed to Continental's president in the 1959 Senate hearings were known to Continental's counsel from the beginning.⁴³ The excerpts introduced on reopening by Commission counsel changed nothing. There is no magic in an exhibit that can create disqualification if none existed prior to receipt in evidence. If such existed here prior to receipt, it went back to 1959 and Continental's attempt to disqualify "was made too late."

The jurisdictional concept that Continental's Washington bread sales were an indivisible part of Continental's integrated national baking business conducted from New York, involving a host of transactions crossing state lines, did not originate for the first time in the Commission's opinion of February 28, 1964. This concept, contrary to Continental's assertion (brief, 63), has been a part of this proceeding from the beginning. On February 26,

⁴³ When Continental's president appeared on June 18, 1959, before the Senate Subcommittee he was accompanied by Roy M. Anderson, then Continental's assistant general counsel (Subcommittee Hearings, Pt. 12, p. 6107). Mr. Anderson, later General Counsel, participated in this proceeding continuously, and appeared "of counsel" on Continental's Petition for Review of the hearing examiner's initial decision filed August 22, 1962 (R. I-A, 559). He also appeared "of counsel" on Continental's exceptions to the initial decision and brief to the Commission. Indeed his name appears on the very first paper filed by Continental in this case on April 14, 1961 (R. I, 12). No mention was ever made of any alleged bias or prejudice on the part of Chairman Dixon, or that "appearances" disqualified him, until October 21, 1964. Chairman Dixon has been a member of the Commission since March 21, 1961.

1962, Commission counsel, in answer to a concerted attack on the Commission's jurisdiction, argued this very point before the hearing examiner (R. III-B, 647-652). He urged that Continental's multi-state baking business must be considered "as a whole," that Continental's integrated, national operation was "commanded" from New York, and that Continental's business could not be split into segments. The *Swift, supra*, 196 U.S. 375, and *South-Eastern Underwriters, supra*, 322 U.S. 533, cases were both cited. The hearing examiner utilized the foregoing concept of commerce (R. I-A, 535-542), refusing to "create an intra-state island" of Continental's business in Washington. Petitioners appealed, and the very same concept of commerce again arose at oral argument before the full Commission including Chairman Dixon (R. III-C, 20-24, at end of volume). There is thus no justification for Continental's failure to raise its claim of disqualification until October 21, 1964 (R. II, 902) when proceedings by the Commission were virtually at an end.

Furthermore, the 1959 Subcommittee hearings show no prejudice of any sort relevant to this proceeding, and "appearances" did not require Chairman Dixon's withdrawal. Continental (brief, 61) quotes a question of Chairman Dixon alleging that it "suggests a pronounced view" of Continental's internal pricing practice. But a mere inquiry by Chairman Dixon in 1959 of the president of Continental, as to whether he wanted to leave the impression that Continental's plant managers had the right to make a major price change without his approval, "suggests" nothing. President Laughlin of Continental incidentally denied such a right, stating that local plant managers could "make the recommendation" (R. II, 893). Certainly this colloquy reveals no "conclusion" on the part of Chairman Dixon as to the merits of this proceeding or the existence of jurisdiction in the Commission.⁴⁴ In fact, this case was not

⁴⁴ Continental writes (brief, 61-62) as if the entire issue of jurisdiction turned on whether Continental headquarters "approved" price changes initiated by Continental executives in individual mar-

even initiated until March 7, 1961, about two (2) years later (R. I, 8). The second quotation urged in Continental's brief (61-62) as disqualifying is a two sentence excerpt from the bottom of p. 147 of Senate Report 1923, 86th Cong. 2nd Sess., stating that "generally" in multi-plant companies local plant managers initiate price changes which must be submitted to and approved by headquarters. Chairman Dixon is said to have been "surely acquainted" with this report, although he is not charged with having written it. The statement in any event is utterly innocuous. It is at most a mere generality showing no prejudgment in any specific case.

Continental's charge that the participation of Chairman Dixon in the decision of the commerce question violates the "appearance" of fairness is simply an assertion. The issue of jurisdiction in this case, aside from Alaskan sales, is a technical legal question involving the construction to be placed on § 5 of the Federal Trade Commission Act. Such a question was not even remotely involved in the 1959 Senate hearings.

Continental cites *Texaco, Inc. v. Federal Trade Commission*, 336 F.2d 754 (D.C. Cir. 1964), and *Amos Treat & Co. v. Securities and Exchange Commission*, 306 F.2d 260 (D.C. Cir. 1962). But those cases are completely different on their facts from anything in this proceeding. *Texaco* involved a speech by Chairman Dixon, when he was Chairman of the Commission, about a case pending before the agency which the court thought revealed "that he had in some measure decided in advance that Texaco had violated the Act". 336 F.2d at 760. *Texaco* thus has no resemblance whatsoever to this case. In 1959, when the Senate hearings were held, complaint had not even issued in this matter and did not issue until 1961.

kets. Evidence in this case, already reviewed, proves such approval is required, but this is merely one facet of the management of Continental's multi-state baking business from New York headquarters involving many transactions crossing state lines.

A conclusion, even if it existed, that local managers only initiated price changes, and that such changes had to be approved by headquarters, does not show any "preconceived opinion" that the Commission had jurisdiction in this case.

Chairman Dixon, of course, was then not connected with the Commission. Obviously nothing was, nor could have been, said in the 1959 hearings indicating any preconceived opinion that the Commission had jurisdiction under the facts in this record, or on any other issue in this proceeding. In *Amos Treat* a member of the Securities and Exchange Commission was barred from sitting in judgment on a case until the question of his participation in the same case as a staff member was resolved. Plainly such a situation is utterly different so far as "appearances" are concerned from that here involved. Continental seeks to distinguish *Federal Trade Commission v. Cement Institute*, *supra*, 333 U.S. at 700-703, by arguing that "legislative" facts were there involved. The Court, however, made no such distinction.

In *Cement Institute* some of the members of the Commission prior to the issuance of the complaint:

* * * were of the opinion that the operation of the multiple basing point system as they had studied it was the equivalent of a price fixing restraint of trade in violation of the Sherman Act. [333 U.S. at 700.]

The legal effect of the use of a multiple basing point system was a key point in issue. The Supreme Court, nevertheless, rejected any suggestion that such an opinion was disqualifying, commenting:

In the first place, the fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondents' basing point practices. Here, in contrast to the Commission's investigations, members of the cement industry were legally authorized participants in the hearings. They produced evidence—volumes of it. They were free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities. [333 U.S. at 701.]

Obviously if the formation of an actual opinion as to the illegality of the basing point system did not prevent the Commission from passing on such a system in *Cement Institute*, the mere posing of some questions to the president of Continental two years prior to the commencement of this case could not possibly disqualify Chairman Dixon because of "appearances." In any event not only was no opinion formed in this case, but nothing in the 1959 Senate Subcommittee proceedings would even suggest the appearance of bias or prejudice to an impartial observer.

IV. The Commission properly entered an order prohibiting petitioners from engaging in price fixing activities in any of the areas in which they sold bread.

Petitioners contend that the Commission's order is improperly broad and that it should have been limited to the geographical area in which the proof showed petitioners to have engaged in price fixing, that is, as they contend, the "Seattle marketing area".⁴⁵ The Supreme Court has made it clear, however, that the Commission has wide latitude in fashioning an order adequate in its discretion to cope with unlawful practices found to exist. *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Federal Trade Commission v. National Lead*, 352 U.S. 419, 428-430 (1957). The Commission concluded that there was no reason to suppose that an entity such as Continental showing no reluctance to fix prices in Seattle, Washington, would act differently in another city or another state (R. II, 864). Congress has placed primary responsibility for fashioning orders upon the Commission, and courts will not interfere where the remedy is an allowable exercise of the Commission's judgment. *Jacob Siegal Co. v. Federal Trade Commission*, 327 U.S. 608, 612, 613 (1946); *Niresk Industries, Inc. v. Federal Trade*

⁴⁵ Contrary to assertions of Continental (brief, 66) and Langendorf (brief, 38), the evidence of price fixing was not limited to the "Seattle marketing area" but extended to the area of the membership of Bakers of Washington, Inc. Such area was essentially western Washington including Yakima.

Commission, 278 F.2d 337, 343 (7th Cir. 1960), *cert. denied*, 364 U.S. 883 (1960). Commission orders will not be lightly modified. *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

The conclusion that Continental, a coast-to-coast business, having engaged in price fixing activities in the State of Washington, should be under an order prohibiting similar conduct elsewhere in its area of operations was reasonable and an allowable exercise of the Commission's judgment under the circumstances. *Maryland Baking Company v. Federal Trade Commission*, 243 F.2d 716, 718 (4th Cir. 1957). In that case, as in this, petitioner complained because the Commission had not limited the order to the area in which the unfair practice had occurred.⁴⁶ The court stated:

As to territorial extent, the company, having been found guilty of a flagrant violation of the act, was properly required to cease and desist from such practices *in all areas* in which it was doing business [243 F.2d at 718, emphasis added.]

In *Foremost Dairies, Inc. v. Federal Trade Commission*, CCH 1965 Trade Cases ¶71,500 (5th Cir. 1965), Foremost, a dairy company operating a multi-state business from 50 plants in 24 states, engaged in price discrimination in the sale of milk "in the Albuquerque, New Mexico, market." The Commission in that case, as here, issued an order prohibiting such discriminations by Foremost wherever it sold milk.⁴⁷ On review Foremost, like

⁴⁶ Continental seeks to distinguish *Maryland Baking* on the claim that Continental is not a firm with centralized pricing. However, as described, New York headquarters of Continental approves all major bread price changes by the many individual Continental bakeries. Membership in Bakers of Washington, Inc., moreover, was approved by New York headquarters (R. I, 304). No contention, of course, has been made that Continental could not institute any internal system for setting prices that headquarters desired. Absolute authority on prices exists in top executives of Continental in New York. Continental's claimed basis for distinguishing *Maryland Baking* thus has no cogency.

⁴⁷ Similarly in *United Biscuit Company of America v. Federal Trade Commission*, CCH 1965 Trade Cases ¶ 71,528 (7th Cir. 1965),

Continental, contended not only that no order at all should have issued but that, if any order was proper, it should have been limited to the Albuquerque, New Mexico, market. The court, however, affirmed the Commission's order prohibiting Foremost from unlawful price discriminations wherever it sold milk, stating:

To limit the Commission to the entry of orders which are directed only to the specific violation found to exist would be not only unrealistic but also would frustrate the purposes of the Robinson-Patman Act.

Limiting the order in this proceeding, as contended for by petitioners, would likewise frustrate the purposes of the Federal Trade Commission Act. The Commission would be compelled to prove price fixing by Continental, for example, in many cases before such activities could be stopped in 65 cities and 32 states where Continental sells bread.

Petitioners cite a number of cases in their attempt to limit the geographic application of the Commission's order. But none of these cases bears on the permissible scope of an order in a price fixing case based on proof in a specific locality. The cases cited by petitioners all involved orders couched in generalized language, usually in terms of the statute itself, and hence have no pertinency to the order in this proceeding.

Continental and Langendorf cite *National Labor Relations Board v. Express Publishing Co.*, 312 U.S. 426 (1941). Continental (brief, 39) not only misapplies the case but, in connection with it, misstates the facts in the instant proceeding. The price fixing shown in this record was a continuing practice over a long period, not "one local violation." *Express Publishing*, moreover, concerned

the evidence showed price discriminations in the sale of "cookies and crackers." The Commission, however, issued an order applicable to all "food products." The order was challenged by United Biscuit as "too broad in its scope". The court rejected this contention finding that a broad order applicable to all food products, once a violation had been established as to a particular variety, was well within the discretion of the Commission.

the propriety of a general injunction to obey a statute issued on the basis of a violation by a specific type of practice. The locale of the violation was not involved. *Express Publishing* merely means that proof of price fixing would not justify in this proceeding a general order enjoining every violation of § 5 of the Federal Trade Commission Act.⁴⁸ But this principle has no bearing on the Commission's order in this case.

The Commission's order here is specific and precise, is not couched in the generalized language of the statute, and no problem exists as to what future conduct will violate it. The order prohibits price fixing on bread by petitioners in their marketing areas, and no ambiguity exists. *Swanee Paper Corp. v. Federal Trade Commission*, 291 F.2d 833 (2d Cir. 1961), *cert. denied*, 368 U.S. 987 (1962); *Grand Union Co. v. Federal Trade Commission*, 300 F.2d 92 (2d Cir. 1962); *Giant Food, Inc. v. Federal Trade Commission*, 307 F.2d 184 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 910; *R. H. Macy v. Federal Trade Commission*, 326 F.2d 445 (2d Cir. 1964); and *American News Co. v. Federal Trade Commission*, 300 F.2d 104 (2d Cir. 1962), *cert. denied*, 371 U.S. 824, all involved orders against discriminatory advertising allowances phrased in broad, essentially statutory language. Contrary to the precision of the order in this case, the Courts held they lacked specificity, and presented questions as to exactly what particular future conduct was prohibited. In *Swanee*, for example, the court noted that the language of the Commission's order was so general that the burden of enforcing § 2(d) of the Clayton Act, as amended, was shifted from the Commission to the federal courts. These cases thus have no resemblance at all to that in this proceeding, and the action of the courts in rendering general language of the order more specific does not support in

⁴⁸ In fact, the Court in *Express Publishing Co.* specifically endorsed the principle that when one has been found to have violated the law he may be restrained from committing other related unlawful acts. 312 U.S. at 436.

the slightest the contention of petitioners as to the order here.

In *Federal Trade Commission v. Henry Broch & Co.*, 368 U.S. 360 (1962), the Court noted that because of civil penalties Commission orders should be "clear and precise" to avoid raising serious questions as to their meaning and application. But, as stated, there is no problem here of clarity or precision, and no question exists as to the meaning and application of this order. Petitioners know exactly what is prohibited.

Petitioners also cite *Korber Hats, Inc. v. Federal Trade Commission*, 311 F.2d 358 (1st Cir. 1962), *Country Tweeds, Inc. v. Federal Trade Commission*, 326 F.2d 144 (2d Cir. 1964), and *Bankers Securities Corp. v. Federal Trade Commission*, 297 F.2d 403 (3d Cir. 1961). But again contrary to the situation here, unspecific, generalized orders against deceptive practices had been issued in those cases which the courts thought could raise questions of meaning and application in the event of future enforcement proceedings. In contrast to the cases cited by petitioners, *Maryland Baking, supra*, 243 F.2d 716, and *Foremost Dairies, supra*, CCH 1965 Trade Cases, are exactly in point constituting specific authority for applying an injunction against a practice found to exist in one marketing area to the other marketing areas of petitioners.

Furthermore, it is clear that the Commission can "close all roads to the prohibited goal," *Federal Trade Commission v. Ruberoid Co., supra*, 343 U.S. at 473, and that "those caught violating the Act must expect some fencing in." *Federal Trade Commission v. National Lead Company, supra*, 352 U.S. at 431.

CONCLUSION

For the foregoing reasons the Commission's order to cease and desist is proper in all respects and should be affirmed and enforced.⁴⁹

Respectfully submitted,

JAMES MCL. HENDERSON,
General Counsel,

J. B. TRULY,
Assistant General Counsel,

CHARLES C. MOORE, JR.,
DANIEL H. HANSCOM,
Attorneys,

Attorneys for the Federal Trade Commission.

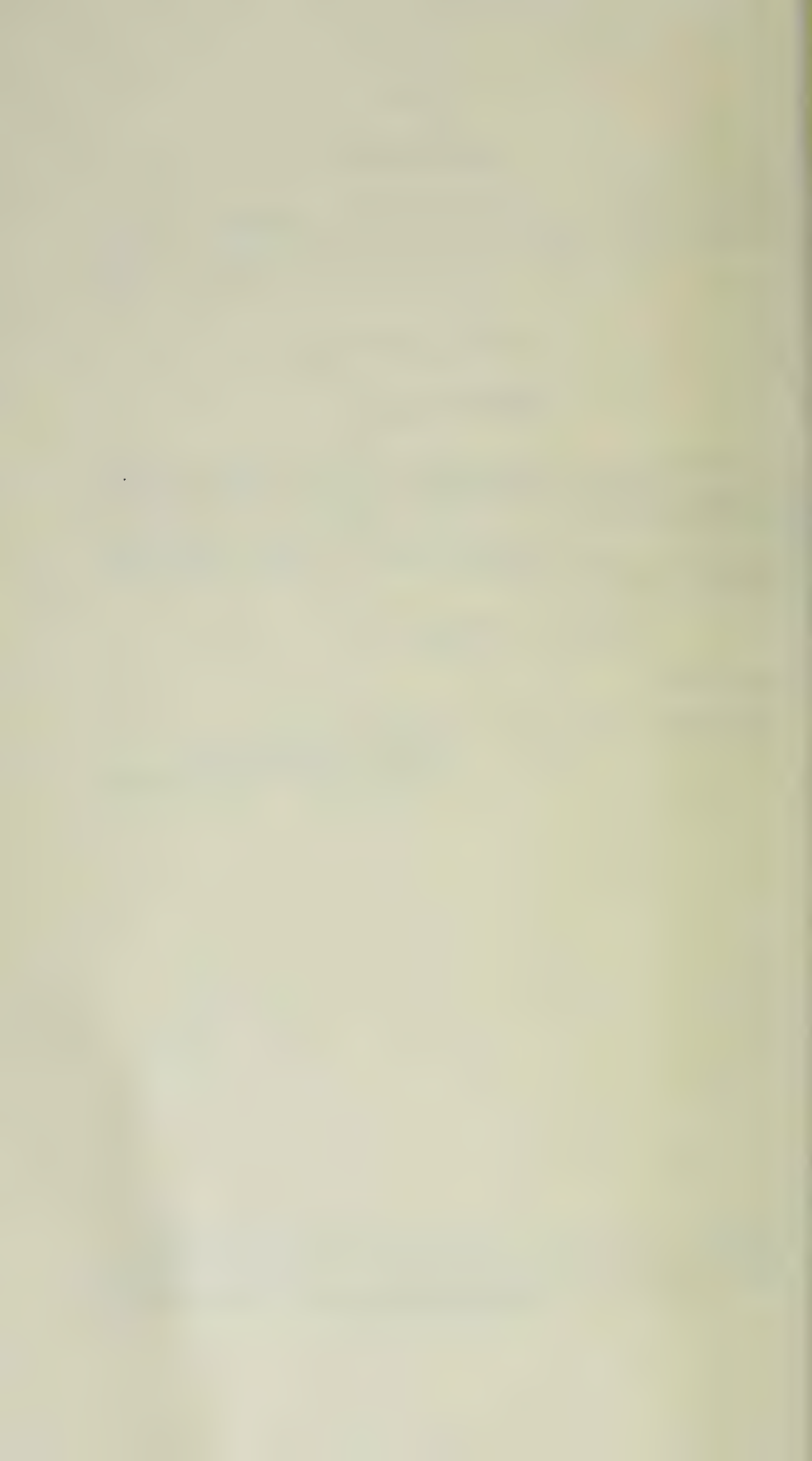
Washington, D.C. 20580

⁴⁹ "To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." Federal Trade Commission Act, Sec. 5(c), 52 Stat. 112, 15 U.S.C. 45(c).

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DANIEL H. HANSCOM
Attorney



No. 20332

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MAURICE EMILE BEAUREGARD,

Appellant,

vs.

WILLIAM H. WINGARD and ERNEST C. MICHAEL,

Appellees.

On Appeal From the United States District Court for
Southern District of California, Southern Division.

APPELLEES' BRIEF.

McINNIS, FOCHT & FITZGERALD and
JAMES L. FOCHT,

1301 U.S. National Bank Bldg.,
San Diego, California,

Attorneys for Appellees.

FILED

DEC 6 1965

FRANK H. SCULLY, CLERK

TOPICAL INDEX

	Page
Statement of the case	1
Statement of facts	8
Argument	15

I.

The answers of the jury to the first three questions under the special verdict do not affect the correctness of the judgment for appellees rendered by the Trial Court	15
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----

II.

Appellant's contentions as to the judgment in favor of appellee Michel are without merit	23
------------------------------------------------------------------------------------------------	----

III.

There was no "Wrongful Arrest" of appellant	23
--------------------------------------------------	----

IV.

There was no error in the Trial Court's rulings regarding "entrapment"	25
------------------------------------------------------------------------------	----

Conclusion	29
------------------	----

TABLE OF AUTHORITIES CITED

Cases	Page
Adams v. Home Owners' Loan Corp., 8 Cir., 107 F. 2d 139	18
Anderson v. Rohrer, 3 F. Supp. 367 [S. D. Florida]	17
Arnold v. Bostick, 9 Cir., 339 F. 2d 879	19
Beauregard v. Wingard, 230 F. Supp. 167 [D.C.S.D. Cal., 1964]	2
Bradley v. Fisher, 13 Wall. 335, 20 L. Ed. 646	19
Byrne v. Kysar, 7 Cir., 347 F. 2d 734	19
Cohen v. Norris, 9 Cir., 300 F. 2d 24	19
Cooper v. O'Connor, App. D.C., 99 F. 2d 135, 118 A.L.R. 1440, cert. den., 305 U.S. 643, 59 S. Ct. 146	16, 19
Coverstone v. Davies, 38 Cal. 2d 315, 239 P. 2d 876	16
Diaz v. Chatterton, 229 F. Supp. 19 [D.C.S.D. Cal.]	21
Gregoire v. Biddle, 177 F. 2d 578	17
Haldane v. Chagnan, 9 Cir., 345 F. 2d 601	19
Hardy v. Vial, 48 Cal. 2d 577, 311 P. 2d 494	16
Laughlin v. Garnett, App. D.C., 138 F. 2d 931, cert. den., 322 U.S. 738, 64 S. Ct. 1055	16
Nesmith v. Alford, 5 Cir., 318 F. 2d 110	23
Phelps v. Dawson, 8 Cir., 97 F. 2d 339	16, 19, 20
Phillips v. Nash, 2 Cir., 311 F. 2d 513, cert. den., 374 U.S. 809, 83 S. Ct. 1700	22
People v. Benford, 53 Cal. 2d 1, 345 P. 2d 928	28
People v. McLaughlin, 111 Cal. App. 2d 781, 245 P. 2d 1076	24
People v. Perez, 62 A.C. 816	28

	Page
Rhodes v. Meyer, 8 Cir., 334 F. 2d 709, cert. den., 379 U.S. 915, 85 S. Ct. 263	20
Sires v. Cole, 9 Cir., 320 F. 2d 877	19
Springfield v. Carter, 8 Cir., 175 F. 2d 914	16, 17
White v. Towers, 37 Cal. 2d 727, 235 P. 2d 209	16, 20

Statutes

California:

California Penal Code, Sec. 337(a)	2, 4, 5, 6
.....	23, 24, 26
California Penal Code, Sec. 836	24

Federal:

United States Code, Title 42, Sec. 1983	1, 2, 22
-----------------------------------------------	----------

Other Authorities

28 American Law Reports, Annotated 2d, p. 646	20
----------------------------------------------------	----

Rules

Federal Rules of Civil Procedure, Rule 49(a)	2, 27
---------------------------------------------------	-------

No. 20332

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MAURICE EMILE BEAUREGARD,

Appellant,

vs.

WILLIAM H. WINGARD and ERNEST C. MICHAEL,

Appellees.

On Appeal From the United States District Court for
Southern District of California, Southern Division.

APPELLEES' BRIEF.

Statement of the Case.

Appellant sued appellees, William H. Wingard, Chief of Police of the City of Oceanside, California, and Ernest C. Michel [sued herein as Ernest C. Michael], a detective on the Oceanside Police Force. Appellant's Second Amended Complaint, upon which issue was joined and the case tried, purported to charge a violation of appellant's civil rights under 42 U.S. Code Section 1983. The complaint sought damages for "malicious prosecution." [C. T. 7.] In substance it alleged that appellees, acting in their official capacities and within the scope of their employment, maliciously arrested appellant without warrant or probable cause for

violation of Section 337a of the California Penal Code, the California bookmaking statute, that appellees acted pursuant to a malicious plan to force appellant into a compromising position to make it appear that he had committed the offense, that appellant was in fact innocent of the offense charged and was acquitted thereof.

Judge Weinberger denied appellees' motion to dismiss the Second Amended Complaint, his opinion appearing in *Beauregard v. Wingard*, 230 F. Supp. 167 [D.C.S.D. Cal., 1964]. We interpret Judge Weinberger's opinion as holding that the Second Amended Complaint stated a cause of action under 42 U.S. Code Section 1983, in that it charged that appellant was maliciously arrested by appellees without a warrant and without probable cause, not for the purpose of enforcing the law, but with an ulterior motive. (230 F. Supp. 185.)

After an extended jury trial Judge Kunzel, who presided at the trial in the District Court, submitted the case to the jury under a special verdict pursuant to Rule 49(a). It is stated in Appellant's Brief on page 5 thereof, "The case went to the jury on February 25, 1965, and it was not until February 24, 1965, and late on that date, that counsel knew that this matter was to be tried on the basis of special interrogatories under Rule 49(a)." This statement is incorrect. Counsel was advised of the Court's intention in this regard on February 19, 1965. [R. T. 634, 635.] In fact the record discloses that three or four months prior to the trial, counsel were requested by the Trial Court at a pre-trial hearing to file interrogatories to be submitted to the jury. [R. T. 838.] On February 23, 1965, Judge Kunzel discussed with counsel the interrogatories he was

preparing. [R. T. 647, 655, 656.] Nineteen questions were submitted under the special verdict. The jury returned answers to all the questions to which answers were required. Appellant has quoted and discussed only the first three questions and answers under the special verdict. The complete list of questions and the answers thereto by the jury is as follows:

- “1. Prior to the arrest of plaintiff, did the defendant William H. Wingard have reasonable grounds upon which to base a suspicion that plaintiff was engaged in bookmaking?

Yes	0
No	<u>12</u>

2. Was the defendant William H. Wingard motivated by malice against plaintiff when he requested the defendant Ernest C. Michael and Gene Cowley to ascertain whether plaintiff would accept a bet?

Yes	<u>12</u>
No	<u>0</u>

3. Did the defendant William H. Wingard request the defendant Ernest C. Michael and Gene Cowley to determine whether the plaintiff would accept a bet motivated by reason of personal bias against the plaintiff, and not in the interest of law enforcement?

Yes	<u>12</u>
No	<u>0</u>

4. If your answer to question No. 2 is Yes—Did the defendant Ernest C. Michael have any knowledge that the defendant William H. Wingard was motivated by malice against plaintiff when he was requested to ascertain whether plaintiff would accept a bet?

Yes	0
No	<u>12</u>

5. If your answer to question No. 3 is Yes—
Did the defendant Ernest C. Michael have
any knowledge that the defendant William
H. Wingard was motivated by reason of per-
sonal bias against plaintiff, and not in the
interest of law enforcement when he was re-
quested to ascertain whether plaintiff would
accept a bet? Yes 0
No 12
6. If your answer to either of questions Nos. 4
or 5 is Yes—Did the defendant Ernest C.
Michael, in effecting plaintiff's arrest, act
in accordance with the purposes of the de-
fendant William H. Wingard and not in the
interest of law enforcement? Yes —
No —
7. Did the defendant Ernest C. Michael have
reasonable grounds to believe that plaintiff
had violated Section 337(a) of the Califor-
nia Penal Code when he effected plaintiff's
arrest? Yes 12
No 0
8. Was the defendant Ernest C. Michael moti-
vated by malice against plaintiff when he
effected plaintiff's arrest? Yes 0
No 12
9. Did the defendant Ernest C. Michael effect
plaintiff's arrest for reasons other than in
the interest of law enforcement? Yes 0
No 12
10. Did the defendant William H. Wingard
order the defendant Ernest C. Michael to
sign the prosecution complaint against plain-
tiff? Yes —
No —

11. If your answer to question No. 10 is Yes—
Did the defendant William H. Wingard have
reasonable grounds to believe that plaintiff
was guilty of violating Section 337(a) of
the California Penal Code when he ordered
Ernest C. Michael to sign the prosecution
complaint? Yes _____
No _____
12. If your answer to question No. 11 is No—
Was the defendant William H. Wingard
motivated by malice against plaintiff in
ordering the defendant Ernest C. Michael to
sign the prosecution complaint? Yes _____
No _____
13. If your answer to question No. 11 is No—
Was the defendant William H. Wingard
motivated by personal bias against the plain-
tiff and not in the interest of law enforce-
ment in ordering the defendant Ernest C.
Michael to sign the prosecution ocmplaint? Yes _____
No _____
14. If your answer to either of questions 12 or
13 is Yes—Did the defendant Ernest C.
Michael, in signing the prosecution com-
plaint, act in accordance with the purpose of
the defendant William H. Wingard and not
in the interest of law enforcement? Yes _____
No _____
15. If your answer to question No. 10 is Yes—
Did the defendant Ernest C. Michael sign
the prosecution complaint be reason of an
order of William H. Wingard rather than
upon his own initiative? Yes _____
No _____

16. Did the defendant Ernest C. Michael make a full and fair disclosure of the material events leading up to the arrest and of the arrest of plaintiff, to Claude Brown, the Deputy District Attorney? Yes 12
No 0
17. Did the defendant Ernest C. Michael have reasonable ground to believe that plaintiff had violated Section 337(a) of the California Penal Code when he signed the prosecution complaint? Yes 12
No 0
18. If your answer to questions Nos. 16 and 17 are No— Was the defendant Ernest C. Michael motivated by malice against plaintiff when he signed the prosecution complaint? Yes
No
19. If your answer to question No. 18 is Yes— Did the defendant Ernest C. Michael sign the prosecution complaint for reason other than in the interest of law enforcement? Yes
No

Thereafter the Trial Judge gave judgment in favor of appellees on the special verdict and also rendered its "MEMORANDUM OF DECISION AND FINDINGS ON THE ISSUE OF ENTRAPMENT." [C. T. 138.] In the latter Judge Kunzel analyzes the basis for his determination that the answers to the questions under the special verdict require a judgment in favor of appellees and he also made a finding on the issue of entrapment. The Trial Judge stated in the

above "Memorandum of Decision and Findings On The Issue Of Entrapment":

"Although it is not deemed necessary to support the judgment in favor of the defendant Wingard, a finding on the issue of entrapment will be made in accordance with Fed. R. Civ. P. 49(a), as follows. The court finds that it is true that: (1) Officer Gene Cowley, a Deputy Sheriff of San Diego County, entered plaintiff's place of business about 1 P.M., August 30, 1960; (2) that Gene Cowley told plaintiff he was a friend of Jimmy Cusenza; (3) that Cowley told plaintiff that Jimmy Cusenza had told him about the "set up and that Cowley wanted to place a bet on a horse running in the fifth race at Del Mar, and that plaintiff accepted \$10.00 to bet on the horse; and (4) that Jimmy Cusenza was at one time the owner of a bar in Oceanside which required special police surveillance, and had at one time been convicted of gambling, and had been denied a bail bond broker's license by the State of California because of his poor character. From the foregoing finding of fact it is concluded that plaintiff was neither entrapped nor induced to accept the bet." [C. T. 143, 144.]

In the same Memorandum of Decision Judge Kunzel commented on the lack of support for the answers given by the jury to the first three questions under the special verdict. [C. T. 144, 145.] The Trial Judge's reaction to these three answers also appears in the reporter's transcript. [R. T. 900, 901.] It is summarized in these words, "I believe that the evidence is somewhat overwhelming that Chief Wingard did have reasonable grounds to suspect the defendant." [R. T. 901.]

Statement of Facts.

The Statement of Facts contained in Appellant's Brief is an argumentative presentation of portions of testimony that favored appellant's cause, largely extracts from the testimony of appellant himself. Also incorporated in appellant's "Statement Of Facts" is material of dubious propriety such as extracts from appellant's own trial memorandum in the form of alleged comments made by the San Diego County Superior Court Judge during appellant's trial for book-making. (App. Br. p. 26.) [We likewise question the propriety of the "off the record" comment on page 32 of Appellant's Brief that the same Superior Court Judge stated that many judges of the Superior Court of San Diego County carry bets to the track for fellow judges.]

A statement of facts supported by the evidence less favorable to appellant's cause is as follows:

Several weeks prior to appellant's arrest, appellee Wingard was informed by Captain Ward Ratcliff of the Oceanside Police Department that he, Captain Ward Ratcliff, had received an anonymous phone call informing him that appellant Beauregard was engaged in book-making. [R. T. 405, 409.] Wingard's testimony in this regard was corroborated by the testimony of Ratcliff who is not a party to the present litigation. [R. T. 507.] Several days thereafter Chief Wingard himself received an anonymous phone call giving the same information. [R. T. 406, 436.] It is not uncommon for such informants to decline to identify themselves. [R. T. 507.]

Following the receipt of this information Wingard made a number of observations of appellant's business

premises. His suspicions were aroused by the number of people frequenting the premises and also by the presence of Jimmy Cusenza, a bar owner whose establishment was under police surveillance and whose F.B.I. rap sheet showed gambling and whose application for a bail bond broker's license had been turned down by the California Insurance Commissioner due to his bad character. [R. T. 550, 551.]

Thereafter appellee Wingard went to the San Diego County District Attorney's Office and requested that office to furnish an undercover investigator. The District Attorney's Office did not have such a man available and suggested that he seek such assistance from the San Diego County Sheriff's Department [R. T. 447.] A Deputy Sheriff, Gene Cowley, was furnished by the Sheriff's Department to assist the Oceanside Police Department. [R. T. 447, 421.]

Chief Wingard's only prior contact with the Beauregards was on an occasion several years before when appellant came to the Wingard residence to report that his wife had been receiving threatening phone calls. Appellee Wingard then visited Mrs. Beauregard and discussed the calls and suggested that the Beauregards obtain an unlisted number. [R. T. 399, 400.] This testimony of Chief Wingard was corroborated by the testimony of his wife, Mrs. Wingard. [R. T. 486, 487.]

Chief Wingard unequivocally denied that he ever warned appellant Beauregard not to criticize the Oceanside Police Department and denied that he knew or had any information that appellant had ever criticized either himself or the Police Department. [R. T. 448, 392.] He had no connection with politics nor with any political campaign of appellant. [R. T. 395, 396, 397.]

Appellee Wingard was under Civil Service, had tenure, and could not be discharged from his position except for cause. [R. T. 448.] On the morning of the incident in question Wingard instructed Michel to work with Deputy Sheriff Cowley and see whether appellant Beauregard would accept a bet. [R. T. 282.] He advised Michael and Cowley of his suspicions that appellant was engaging in bookmaking and furnished them money to use in placing a bet, but gave no specific instructions as to how the attempt to place the bet should be made. [R. T. 423, 424.] Chief Wingard did not give directions that appellant Beauregard be arrested. [R. T. 331.]

Following this meeting with Chief Wingard, Michel and Cowley decided upon the procedure whereby appellant would be approached regarding a bet. [R. T. 198, 199, 286.]

Cowley entered appellant's store and said, "Jimmy told me about the setup," that he knew about a longshot in the fifth called Ole Snuggler and wanted to bet \$10.00 on it to win. He gave appellant the \$10.00 and a notation of the bet was made on a slip of paper furnished by appellant. [R. T. 211, 238, 239, 261.] He stated to Cowley, "Boy, when Belmont opens, I will really make book." [R. T. 241.] Cowley then left by the front door and appellant left by the rear door of his establishment. [R. T. 239.] According to Cowley appellant did not offer to take him to the track [R. T. 208.]

The front of the store faces west. [See Pltf. Exs. 2 and 3.] After leaving the front door Cowley told Michel, who had remained on the sidewalk to the north of the entrance of the store, that he had made the bet

and was leaving via the rear of the store. [245, 303, 304.] Michel and Cowley ran north on the sidewalk, around the corner of the north intersecting street, and south down the alley behind the store where appellant was intercepted. [R. T. 245, 246, 304, 305.] Michel asked appellant if he had taken a bet from Cowley and appellant at first replied that he had not and had never seen Cowley before. [R. T. 246, 306.] After two or three denials he admitted taking the bet. [R. T. 306.] The betting marker was on appellant's person when he was arrested and is in evidence as defendants' Exhibit "H". [R. T. 249, 127.] Appellant admitted in his testimony that he accepted the \$10.00 from Cowley with the intention of taking it to the track and placing the bet. [R. T. 126.]

On appellant's person when arrested was a slip of paper [Deft. Ex. "B"], with the name and phone number of one, Barthel, a recently convicted book-maker. [R. T. 113, 142, 328, 504.]

Appellant's version of events immediately preceding the arrest is discussed at page 19 of Appellant's Brief. Under this version Michel was waiting for him at the rear door of the store and arrested him as soon as he stepped out of the door and before Cowley came down the alley advising Michel that the bet had been accepted. Not only was this version refuted by the testimony of Michel and Cowley, but the testimony of these officers was corroborated by the testimony of the independent witness, John Higdon. The latter was sales manager for a car lot which fronted on the same side of the street as appellant's establishment and was situated to the north thereof. He observed Michel on the sidewalk by the car lot when Cowley came hurry-

ing up the street saying to Michel, "He went out the backway," and the two officers ran up the street, around the corner, and down the alley. [R. T. 377, 378.]

At the Oceanside Police Station appellant admitted to appellee Wingard that he had taken the bet. [R. T. 405.] Appellee Wingard in his testimony denied that he made the statement attributed to him by appellant such as "Frenchie, I set this up," and "book the son-of-a-bitch for a felony." [R. T. 451.] Appellee Michel also denied that the events which transpired while appellant was in the Police Station were as testified to by appellant [R. T. 316, *et seq.*], and denied the occurrence of the conversation testified to by appellant wherein it is asserted that Michel originally was booking appellant for a misdemeanor and was ordered by Chief Wingard to change the booking to a felony. [R. T. 319.]

Following appellant's arrest and release Michel presented the facts to one of the chief deputies in the District Attorney's Office, Claude Brown. Mr. Brown stated there was probable cause for the issuance of a felony bookmaking complaint and his office prepared such a complaint which Michel signed. [R. T. 513, 517.] Following appellant's original arrest Michel received no instructions regarding the prosecution from appellee Wingard. [R. T. 513.] Following a preliminary hearing appellant was bound over for trial on the charge of which he was ultimately acquitted. [R. T. 128.]

Significantly absent from the statement of facts in Appellant's Brief is any reference to the testimony of the witness called on behalf of appellees, Mrs. Isabella Kennedy. This witness testified that on the Saturday following September 6, 1961, she was with her husband, now deceased, when he placed a \$20.00 bet on a

horse with appellant Beauregard in the latter's establishment. [R. T. 495, *et. seq.*] Her husband had been referred to appellant's establishment by another apparent horse player when he had mentioned that he wished to bet a horse, " 'Why, don't you take it up here to Frenchie?' That was the name he gave me—Frenchie—and he directed us to the place." [R. T. 496.] Appellant was an extensive user of a horse racing information service in Los Angeles known as Turf Craft, [R. T. 111, *et. seq.*] Records of his phone calls to Turf Craft are in evidence as defendants' Exhibit "C". Appellant was still utilizing the services of Turf Craft during the month of September, 1961. [R. T. 579, 580.]

Appellant's brief refers to the testimony of Allen Podgers called as a witness on behalf of appellant. When Podgers was tried for the crime of arson in 1958, appellant Beauregard testified on his behalf. [R. T. 672.] That trial resulted in a hung jury. [R. T. 626, 674.]

Podgers testified to certain admissions assertedly made to him by appellee Michel. Michel's version of his conversations with Podgers contradicted the latter's testimony. [R. T. 665, 666.] Michel further testified that on one occasion he had the following conversation with Podgers:

"I said, 'Could you tell me anything about his operation?'

And he just kind of smiled and laughed and as he was letting me out, I said, 'Just answer me one question,' and I asked him to relate yes or no, if Frenchy was a bookmaker, to which he replied, 'Yes,' and I left the apartment and I haven't talked to the man since." [R. T. 666, 667.]

The testimony regarding the events surrounding appellant's arrest as related by appellant was in utter conflict with that of appellees' witnesses. The jury rejected appellant's version. Counsel for appellant noted in his brief (App. Br. p. 15) that the Trial Judge commented on the discrepancies in the testimony and the apparent existence of perjury. It is apparent from Judge Kunzel's later comments in the transcript [R. T. 900, 901], and in his Memorandum of Decision and Findings on the Issue of Entrapment that in his opinion the taint of perjury was on appellant's testimony.

ARGUMENT.

I.

The Answers of the Jury to the First Three Questions Under the Special Verdict Do Not Affect the Correctness of the Judgment for Appellees Rendered by the Trial Court.

Following the rendition by the jury of its special verdict the Trial Judge commented upon the fact that the finding of the jury amounted to no more than a finding that appellee Wingard maliciously requested Michel and Cowley to make an investigation. [R. T. 883, 899.] While he sharply disagreed with the jury's finding of malice and lack of probable cause as to appellee Wingard as reflected in the answers to the first three questions, nevertheless, the acceptance of the jury's finding failed to demonstrate any semblance of a cause of action. [R. T. 899.]

By its answers to the other questions the jury in effect found that there was no conspiracy or malicious consort between appellees Wingard and Michel, that there was no false arrest of appellant, that his arrest by Michel was not activated by malice but was in the interest of law enforcement and based upon probable cause, that Wingard did not order Michel to sign the prosecution complaint and that Michel when he signed the prosecution complaint had reasonable grounds to believe appellant guilty of the offense charged and that he made a full and fair disclosure to the Deputy District Attorney who issued the complaint. In effect, the jury found there was no false arrest and no malicious prosecution.

Counsel for appellant has not cited, and to our knowledge there does not exist, authority that the malicious

instituting of an investigation by a law enforcement officer constitutes a civil cause of action, much less a violation of federally guaranteed constitutional rights.

All analogous authorities support the soundness of the Trial Court's decision. Even though the jury found that there was no malicious prosecution of appellant, if it be contended that appellee Wingard's malicious activation of an investigation smacks of malicious prosecution appellant is faced with the rule that law enforcement officers are immune from suit for malicious prosecution. Law enforcement officers enjoy a classic common-law immunity from civil liability for malicious prosecution. This is recognized by such California and Federal decisions as *White v. Towers*, 37 Cal. 2d 727, 235 P. 2d 209; *Coverstone v. Davies*, 38 Cal. 2d 315, 239 P. 2d 876; *Hardy v. Vial*, 48 Cal. 2d 577, 582, 311 P. 2d 494, 496; *Laughlin v. Garnett*, App. D. C., 138 F. 2d 931, cert. den. 322 U.S. 738, 64 S. Ct. 1055; *Springfield v. Carter*, 8 Cir., 175 F. 2d 914; *Cooper v. O'Connor*, App. D. C., 99 F. 2d 135, 118 A.L.R. 1440, cert. den., 305 U.S. 643, 59 S. Ct. 146; *Phelps v. Dawson*, 8 Cir., 97 F. 2d 339 (citing as authority United States Supreme Court and English cases).

The above-cited case of *Hardy v. Vial*, 48 Cal. 2d 577, 311 P. 2d 494, is pertinent. In applying the rule of absolute immunity to certain state college officials who were alleged to have maliciously and without probable cause made charges and caused the institution of official proceedings leading to the discharge of a professor, the opinion states (at 48 Cal. 2d 583, 311 P. 2d 497):

"The policy on which the rule is based would be defeated if it were held that whenever an officer uses his office for a personal motive not connected with the public good he acts outside his power."

The opinion cites many cases and quotes the policy underlying the doctrine of absolute immunity as stated by Judge Learned Hand in *Gregoire v. Biddle*, 177 F. 2d 578, 581.

In *Springfield v. Carter*, 8 Cir., 175 F. 2d 914, 918, the court stated:

“The established rule of law is that when a prosecution is instituted by public officers, acting within the scope of their official duties, it is against public policy to allow an action for malicious prosecution to be maintained against them on account of such official acts ‘although probable cause be absent and malice be present in their enforcement of the law’. *Gibson vs. Reynolds*, 8 Cir., 172 F. 2d 95, 97; *Adams vs. Home Owners’ Loan Corporation*, 8 Cir., 107 F. 2d 139, 141; *Phelps vs. Dawson*, *supra*; *Cooper vs. O’Connor*, *supra*; *Spalding vs. Cilas*, 161 U.S. 483, 16 S. Ct. 631, 40 L. Ed. 780.”

Plaintiff appellant’s Second Amended Complaint as well as his earlier pleadings alleges that the defendant appellees acted within the scope of their authority [Paragraphs IV and V of plaintiff’s Second Amended Complaint, C. T. 2], and this has been admitted by all parties.

The case of *Anderson v. Rohrer*, 3 F. Supp. 367 [S. D. Florida], is of interest because of the similarity the charges of the plaintiff therein bears to the allegations of appellant herein. In that case it was charged that a public officer together with another did conspire, combine and confederate together to falsely procure plaintiff to be charged with an offense which was dismissed for lack of probable cause and did thereafter

maliciously procure a false indictment against plaintiff which was quashed for lack of evidence. The opinion states:

“Plaintiff alleges, however, that such acts were maliciously and corruptly done, which, plaintiff argues, discloses a perversion of that office, which strips the defendant of immunity as a public officer. A complete answer to this contention is found in *Spalding v. Vilas*, 161 U.S. 483, 16 S. Ct. 631, 635, 40 L. Ed. 780, in which the rule is settled that a public officer is not liable for instituting a prosecution, although he acts with malice and without probable cause, provided the matters acted upon are amongst those generally committed by law to the control or supervision of the office in question and are not manifestly or palpably beyond the authority of such office.

* * *

The opinion in *Spalding v. Vilas* reviews many cases holding that official acts, including the institution of prosecutions, not manifestly or palpably beyond the authority of the office, are not actionable even though the officer acted with mala fides, or with actual malice, or without any reasonable or probable cause, or with knowledge of the falsity of his acts. The opinion concludes with this sentence which is controlling upon the demurrer now before the court. ‘If we were to hold that the demurrer admitted, for the purposes of the trial, that the defendant [officer] acted maliciously, that could not change the law.’ ” (3 F. Supp. 367, 368.)

In *Adams v. Home Owners’ Loan Corp.*, 8 Cir., 107 F. 2d 139, malicious prosecution was charged based

upon allegations that officers of a governmental agency “maliciously caused the indictment to be founded upon fraudulent evidence”. The opinion cites *Phelps v. Dawson*, *supra*, and *Cooper v. O'Connor*, *supra*, in holding that the plaintiff had no cause of action regardless of whether the officers “entertained malice toward the plaintiff or whether they acted in bad faith and without probable cause.”

The decision in *Cohen v. Norris*, 9 Cir., 300 F. 2d 24, 33, recognizes that “a generally recognized common-law immunity” would be a defense in a Civil Rights Act case.

In *Sires v. Cole*, 9 Cir., 320 F. 2d 877, this Court held that the Civil Rights Act creates no exception to the classic immunity enjoyed by judges, prosecuting attorneys and deputies.

Other cases from this Circuit recognizing that traditional immunities are not abrogated by the Civil Rights Act are *Arnold v. Bostick*, 9 Cir., 339 F. 2d 879, and *Haldane v. Chagnan*, 9 Cir., 345 F. 2d 601. Each of the above-cited cases cites with approval the holding of the Supreme Court of the United States in *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646, that immunity is not affected by malice or improper motive. The immunity remains “irrespective of the motives with which those acts are alleged to have been performed” (339 F. 2d at page 880), and even though the “actions were motivated by corruption, malice, or other improper considerations”. (345 F. 2d at page 604.) In the recent case of *Byrne v. Kysar*, 7 Cir., 347 F. 2d 734, 736, it was recognized that a prosecuting officer was entitled to the same immunity from liability under the Civil Rights Act as a judge.

The immunity of law enforcement officers is a phase of the doctrine of "judicial immunity" (See Annotation 28 A.L.R. 2d 646, 650); *White v. Towers*, 37 Cal. 2d 727, 235 P. 2d 209; *Phelps v. Dawson*, 8 Cir., 97 F. 2d 339. Such immunity from liability for malicious prosecution is extended to law enforcement officers for, as stated in *Phelps v. Dawson*, 8 Cir., 97 F. 2d 339, 340:

"The reason is that, in instituting such a charge, he is acting in a so-called quasi-judicial capacity connected with the enforcement of the criminal law. Broadly speaking it is his official duty to institute such proceedings . . . The public welfare requires that this choice shall be free of all fear of personal liability. To assure this freedom of action it is deemed best to make that assurance positive and definite by securing him against even actions based upon a malicious abuse of his official power."

In *Rhodes v. Meyer*, 8 Cir., 334 F. 2d 709, cert. den., 379 U.S. 915, 85 S. Ct. 263, in affirming traditional concepts of immunity including those enjoyed by law enforcement officers, the opinion states:

"This court has also since made a survey of the cases citing *Monroe* to see what effect, if any, it may have on the traditional concepts of immunity. We find there is overwhelming support for the position that judicial immunity and its derivative quasi-judicial immunity have not been affected by *Monroe*. See *Harvey v. Sadler*, 9 Cir., 331 F. 2d 387 (1964); *Agnew v. Moody*, 9 Cir., 330 F. 2d 868 (1964) (citing *Houston* with approval); *Ray v. Huddleston*, W. D. Ky., 212 F. Supp. 343, a'ffd,

6 Cir., 327 F. 2d 61 (1964); Crawford v. Zeitler, 6 Cir., 326 F. 2d 119 (1964); Duzynski v. Nosal, 7 Cir., 324 F. 2d 924 (1963) (citing Houston with approval); Hurburt v. Graham, 6 Cir., 323 F. 2d 723 (1963); Sires v. Cole, 9 Cir., 320 F. 2d 877 (1963); Nesmith v. Alford, 5 Cir., 318 F. 2d 110 (1963); Weller v. Dickson, 9 Cir., 314 F. 2d 598 (1963); Kostal v. Stoner, 10 Cir., 292 F. 2d 492 (1961); Basista v. Weir, W.D. Pa., 225 F. Supp. 619 (1964); Norton v. McShane, 5 Cir., 332 F. 2d 855 (1964). (334 F. 2d 718.)

In *Diaz v. Chatterton*, 229 F. Supp. 19 [D.C.S.D. Cal.], a civil rights case wherein plaintiff charged various defendants with wrongfully conspiring to file a criminal complaint against him, bribe witnesses to present false testimony, maintaining an action against him out of passion and prejudice, etc., it was held:

“Defendant Chatterton being a Deputy District Attorney for Orange County, California, is immune from the within suit.” (229 F. Supp. 22.)

We have cited the above authorities in what is probably an excess of caution. As found by the Trial Court, instituting an investigation, though without probable cause and motivated by malice, is neither a civil tort, nor a violation of the Civil Rights Act. We have cited the authorities to illustrate the extent to which the courts have held that malice and improper motives do not subject the public officer to liability for acts done within the scope of his authority even though the acts go far beyond those of appellee Wingard in the present case, even to the extent of the tort of malicious prosecution.

We commend to this Honorable Court the language of the opinion in the case of *Phillips v. Nash*, 2 Cir., 311 F. 2d 513, cert. den., 374 U.S. 809, 83 S. Ct. 1700. In that case, a Civil Rights case, the plaintiff sued a state official for damages under 42 U.S.C., Section 1983, on the ground he was deprived of his constitutional guarantee of a speedy trial. In holding that the defendant state official was not subject to suit under the Civil Rights Act the opinion states (311 F. 2d 516):

“The instant case is a far cry from the situation in *Monroe vs. Pape*. We think it will be time enough to say the federal Civil Rights Act permits any person who has been prosecuted by a State’s Attorney or an Assistant State’s Attorney to sue such official under the federal Civil Rights Act when and if Congress so determines or when and if the Supreme Court announces an extension of its holding in *Monroe vs. Pape*.

* * *

We are convinced that Congress never intended, by the enactment of the Civil Rights Act, to open the federal courts to suits to be brought by those persons who have been prosecuted by a State’s Attorney and who claim that such official acted with malice, or otherwise did not fully comply with his official duties. We should not, by judicial fiat, convert what would otherwise be ordinary state-law claims for false imprisonment, malicious prosecution or assault and battery into Civil Rights cases merely on the basis of conclusory allegations in a complaint that constitutional rights have been violated.”

II.

Appellant's Contentions as to the Judgment in Favor of Appellee Michel Are Without Merit.

Appellant's contention that the Trial Court erred in failing to render judgment against appellee Michel requires little comment. As stated above, the jury found that there was no false arrest, no malicious prosecution and, in effect, that there was no conspiracy between appellees Wingard and Michel. The case of *Nesmith v. Alford*, 5 Cir., 318 F. 2d 110, cited by appellant in support of his contention as to Michel is not in point. In that case a number of officers were active participants in a false arrest.

III.

There Was No "Wrongful Arrest" of Appellant.

The "wrongful arrest" to which appellant refers in his brief (App. Br. p. 29), simply did not occur. The jury found in its answer to Interrogatory No. 7 that there was probable cause for the arrest of appellant for violation of Section 337a of the California Penal Code. The pertinent provisions of this section are:

"Every person,

* * *

- (3) Who, whether for gain, hire, reward, or gratuitously, or otherwise, receives, holds, or forwards, or purports or pretends to receive hold, or forward, in any manner whatsoever, any money, thing, or consideration of value, or the equivalent or memorandum thereof, staked, pledged, bet or wagered, or to be staked, pledged, bet or wagered, or offered for the purpose of

being staked, pledged, bet or wagered, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, or any lot, chance, casualty, unknown or contingent event whatsoever.

* * *

Is punishable by imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year. This section shall apply not only to persons who may commit any of the acts designated in subdivisions one to six inclusive of this section, as a business or occupation, but shall also apply to every person or persons who may do in a single instance any one of the acts specified in said subdivisions one to six inclusive."

Violation of Penal Code Section 337a is a felony unless or until judgment has been pronounced assessing a penalty less than confinement in a state prison. (*People v. McLaughlin*, 111 Cal. App. 2d 781, 792, 245 P. 2d 1076.)

Section 836 of the California Penal Code provides as follows:

"A peace officer may make an arrest in obedience to a warrant, or may, without a warrant, arrest a person:

1. Whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence.

2. When a person arrested has committed a felony, although not in his presence.
3. Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed."

The findings of the jury that there was probable cause for the arrest are amply supported by the evidence. Indeed, the testimony of the disinterested witness, Isabella Kennedy, is sufficient to utterly discredit appellant's testimony and would justify the conclusion that appellant, at the time in question, was in fact a professional bookmaker.

IV.

There Was No Error in the Trial Court's Rulings Regarding "Entrapment".

Appellant submitted no proposed instructions on entrapment and submitted no proposed interrogatories on the subject under the special verdict. Appellant's Brief (at page 65) refers to his objection and exception to the Trial Court's treatment of the matter of entrapment. The record discloses that during a discussion with counsel the Trial Judge expressed his opinion that under the evidence there was not "entrapment as a matter of law", and the following exchange took place:

"Mr. Schwartz: Let the record show that I do disagree with His Honor and do take an exception.

The Court: To what?

Mr. Schwartz: That entrapment as a matter of law is not involved here. I think it is." [R. T. 798.]

In its MEMORANDUM OF DECISION AND FINDINGS ON THE ISSUE OF ENTRAPMENT the Trial Court gave the basis for its determination that the evidence does not warrant a finding “that there was entrapment as a matter of law”. [C. T. 143.] The Trial Court in the above-cited Memorandum, although expressing the opinion that it was not necessary to support judgment against appellant, proceeded to make a finding of fact that there as no entrapment. [C. T. 143.] The Trial Court’s finding in that regard is quoted under the Statement of the Case at the commencement of this brief and we submit the finding is fully supported by the evidence.

Appellant in his brief (page 65) refers to the Trial Court’s reference to *prima facie* violation of California Penal Code Section 337a and states:

“Again appellant’s counsel excepted to the Court’s failure to inform the jury how this ‘prima facie’ evidence could be overcome by an instruction on entrapment and/or equitable estoppel.” (App. Br. p. 65.)

The quoted statement appears to be a loose interpretation of the record. Following the Court’s statement to the jury:

“There is a prima facie violation of law when the bet is taken with the intent of transporting that money to the race track.”

[R. T. 832], there was this exchange between appellant’s counsel and the Trial Court:

“Mr. Schwartz: If the Court please, I will enter at this point an exception to the Court’s decision not to also inform the jury that there are

ameliorating circumstances which should be considered by the jury in viewing 337(a), including equitable estoppel.

The Court: Including entrapment?

Mr. Schwartz: Equitable estoppel." [R. T. 832, 833.]

Rule 49(a), which authorizes the use of a special verdict provides in part as follows:

"If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."

In reply to appellant's assertions regarding entrapment we respectfully submit that [1] appellant waived his right to trial by jury on the issue of entrapment, if, in fact, it was a proper issue and [2] if, in fact, entrapment was a proper issue it was properly determined adverse to appellant by the Trial Court in its finding on the subject.

Further, with reference to the matter of entrapment it should be noted that the jury found there was probable cause for the arrest of appellant. Hence, even if the acts of Deputy Sheriff Cowley constituted an "entrapment" and even if the fact of such entrapment required a finding that appellant did not commit the offense for which he was arrested, nevertheless, the jury found there was probable cause for appellant's arrest and hence there was no false arrest.

Moreover it appears to be the law that the fact that entrapment may be available as a defense to a criminal charge does not alter the fact of the guilt of the accused. The basis for the defense of entrapment in California is stated in the opinion of the Supreme Court in *People v. Benford*, 53 Cal. 2d 1, 8 and 9, 345 P. 2d 928:

“In California recognition of the defense is said to rest upon the broadly stated grounds of ‘sound public policy’ and ‘good morals.’ . . . Entrapment is a defense not because the defendant is innocent but because, as stated by Justice Holmes (dissenting in *Olmstead v. United States* (1928), 277 U. S. 438, 470 [48 S. Ct. 564, 72 L. Ed. 944, 66 A.L.R. 376], an illegally obtained evidence case), ‘it is a less evil that some criminals should escape than that the Government should play an ignoble part.’ (Frankfurter, J., concurring in *Sherman v. United States* (1958), *supra*, p. 380 of 356 U.S.)”

In the concurring opinion of Mr. Justice Frankfurter to which the above quotation alludes it is further stated:

“If he is to be relieved from the usual punitive consequences, it is on no account because he is innocent of the offense described. In these circumstances, conduct is not less criminal because the result of temptation, whether the tempter is a private person or a Government agent or informer.” (356 U.S. 380.)

The position expressed in *People v. Benford*, *supra*, is not altered by the recent California case of *People v. Perez*, 62 A.C. 816, cited on page 67 of Appellant’s

Brief. The opinion in that case declares that a defendant is not required to admit guilt in order to avail himself of the defense of entrapment, disapproving statements to the contrary in earlier cases. It does not alter the state of the law regarding the guilt of the entrapped defendant.

Conclusion.

In summary we respectfully submit:

1. The answers to the first three interrogatories under the special verdict do not amount to a finding of the commission of a tortious act or a violation of appellant's civil rights.

2. The answers to the balance of the interrogatories amount to findings that there was no malicious prosecution, no false or malicious arrest, no conspiracy between appellees, Wingard and Michel, and no violation of appellant's civil rights, findings all abundantly supported by the evidence.

3. Appellant's reliance upon "entrapment" avails him naught. The issue of entrapment was not presented by appellant under the special verdict, it was decided adversely to appellant by the Trial Court as a separate finding of fact. Even if appellant had been "entrapped" his arrest and subsequent prosecution were based upon probable cause.

The judgment of the Trial Court should be affirmed.

Respectfully submitted,

McINNIS, FOCHT & FITZGERALD and
JAMES L. FOCHT,

Attorneys for Appellees.

Certificate (Rule 18.2(g)).

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

McINNIS, FOCHT & FITZGERALD
and JAMES L. FOCHT

By JAMES L. FOCHT

Attorneys for Appellees.

No. 20331

United States
COURT OF APPEALS
for the Ninth Circuit

ORDER OF RAILWAY CONDUCTORS AND
BRAKEMEN, a voluntary unincorporated
association, T. M. DELANEY, individually
and as General Chairman, LEO HOLZACHUH, EARL A.
JONES, E. O. BUDAH, and M. H. MEISTRELL, indi-
vidually and as Local Chairman,

Defendants-Appellants,

v.

SPOKANE, PORTLAND & SEATTLE RAILWAY
COMPANY, a Washington corporation,
OREGON TRUNK RAILWAY, a Washington
corporation, and OREGON ELECTRIC RAILWAY
COMPANY, an Oregon corporation,

Plaintiffs-Appellees.

*Appeal from the United States District Court
for the District of Oregon*

**BRIEF FOR APPELLANTS' ORDER OF RAILWAY
CONDUCTORS AND BRAKEMEN, ET AL**

CLIFFORD D. O'BRIEN,

514 Corbett Building, Portland, Oregon 97204,

HARRY J. WILMARTH,

Merchants National Bank Building, Cedar Rapids, Iowa,

Attorneys for Appellants.

STEVENESS LAW PUB. CO.

PORTLAND, ORE.

9-65

OCT 4 1965

FRANK H. SCHMID, CLERK

SUBJECT MATTER INDEX

	Page
Statement of Basis of Jurisdiction	1
Statement of the Case	2
The Pleadings	2
The Hearing	6
Findings of Fact	6
Conclusions of Law	7
The Temporary Injunction	7
Specifications of Errors Relied Upon	7
1. Court below erred in holding threatened strike was for the purpose of compelling agreement with respect to minor dispute	7
2. Court below erred in holding threatened strike was for the purpose of compelling agreement with respect to dispute properly referable under Section 3 of Railway Labor Act	8
3. Court below erred in holding threatened strike unlawful and enjoiable	8
4. Court below erred in failing to hold threatened strike was for purpose of securing agreement to amend prior agreement	8
5. Court below erred in failing to hold defendant's Notice of August 3, 1964, proper under Section 6 of the Railway Labor Act	8
6. Court below erred in holding it had jurisdiction to enjoin strike contrary to provisions of Nor- ris-La Guardia Act, 29 U.S.C. 101, et seq.	8
7. Court below erred in failing to hold that the threatened strike presented a labor dispute within the meaning of the Norris-La Guardia Act, 29 U.S.C. 101, et seq.	8
8. Court below erred in finding that plaintiffs had duly performed all terms and conditions of National Agreement in that plaintiffs have re- fused to negotiate in accordance with the terms of said agreement	8, 9

INDEX (Cont.)

	Page
9. Court below erred in issuing the temporary injunction	9
Argument	9
I. The Norris-La Guardia Act, 29 U.S.C. 101, et seq., deprived the court of jurisdiction to enjoin the strike here involved	9
A. The labor dispute with respect to which the ORC&B threatened to strike is not the same labor dispute as the one which SP&S attempted to submit to the adjustment boards	9
B. The labor dispute with respect to which ORC&B threatened to strike is a major dispute	21
C. The labor dispute with respect to which the ORC&B threatened to strike is not properly enjoined even if it is a minor dispute because it has never been submitted to an adjustment board	28
D. Even if it be held that the threatened strike relates to the labor dispute which has been submitted to the adjustment board, since the threatened strike is over a major dispute the submission to the adjustment board does not endow the court with jurisdiction to enjoin the strike	29
II. Under the provisions of Section 7 of the Norris-La Guardia Act, 29 U.S.C. 107, the ORC&B is entitled to attorney's fees and expenses upon its successful defeasance of a suit for injunction	31
Conclusion	31
Certificate	32

INDEX (Cont.)

	Page
Appendices:	
“A” List of Exhibits	33
“B” Section 6 Notice served by ORC&B on Denver and Rio Grande Western Railway Company August 14, 1964	35
“C” Protest of Denver and Rio Grande Western Railway Company to ORC&B Section 6 Notice	37
“D” Ruling of National Mediation Board dated July 29, 1965, holding ORC&B Notice proper under Section 6 Railway Labor Act	39
“E” ORC&B Section 6 Notice to L & N Railway, September 14, 1964	41
“F” Section 6 Notice of BRT to L & N Railway dated September 28, 1964	43
“G” National Mediation Board ruling dated April 14, 1965, served on L & N Railway by ORC&B and BRT were proper Section 6 Notices	45
“H” Agreement reached between L & N Railway and BRT dated July 6, 1965	47

TABLE OF AUTHORITIES

	Page
CASES CITED	
Brotherhood of Locomotive Engineers v. L. & N. R. Co., 373 U.S. 33, 83 S. Ct. 1059, 10 L. Ed. 172	19, 28
Butte, Anaconda & P. Ry. Co. v. Brotherhood of Locomotive Firemen & Enginemen (C.A. 9, 1959) 268 F.2d 54	22, 23, 24
Elgin, Joliet & E. Ry. Co. v. Brotherhood of Railroad Trainmen (C.A. 7, 1962) 302 F.2d 540	31
Manion v. Kansas City Terminal Ry. Co., 353 U.S. 927, 77 S. Ct. 706, 1 L. Ed. 2d 722	19, 28
Missouri-Illinois R. Co. v. Order of Railway Conductors (C.A. 8, 1963) 322 F.2d 793	19, 20, 21, 25, 30
Order of Railroad Telegraphers v. Chicago & N.W. R. Co., 362 U.S. 330, 80 S. Ct. 761, 4 L. Ed. 2d 774	24

STATUTES CITED

28 U.S.C. 1292 (1)	1
Norris-La Guardia Act:	
29 U.S.C. 101	1, 5, 8, 9, 28, 29
29 U.S.C. 104	5
29 U.S.C. 107	31
29 U.S.C. 108	5
29 U.S.C. 113	5
Railway Labor Act:	
45 U.S.C. 151	1, 7
45 U.S.C. 153 First (1)	7, 8, 14, 29
45 U.S.C. 156	5, 8, 16, 21, 22

MISCELLANEOUS ORDERS, AWARDS, AND REPORTS CITED

National Mediation Board Ruling, dated July 29, 1965, Appendix D	39
National Mediation Board Ruling, dated April 14, 1965, Appendix G	45

No. 20331

United States
COURT OF APPEALS
for the Ninth Circuit

ORDER OF RAILWAY CONDUCTORS
AND BRAKEMEN, et al,

Defendants-Appellants,

v.

SPOKANE, PORTLAND & SEATTLE
RAILWAY CO., et al.,

Plaintiffs-Appellees.

*Appeal from the United States District Court
for the District of Oregon*

**BRIEF FOR APPELLANTS' ORDER OF RAILWAY
CONDUCTORS AND BRAKEMEN, ET AL**

STATEMENT OF BASIS OF JURISDICTION

This is an appeal from a preliminary injunction enjoining a labor organization from conducting a threatened strike (R. 116-117). This court has jurisdiction by virtue of 28 U.S.C. 1292(1). The district court based its decision on the ground that the dispute over which a strike was threatened was a minor dispute under the provisions of the Railway Labor Act, as

amended (45 U.S.C. 151 et seq.), and as such was properly referable to an adjustment board under Section 3 of that Act (R. 115). The labor organization contends that the dispute over which the strike was threatened was a major dispute as to which a strike was completely proper and lawful and hence jurisdiction to issue the injunction was removed by the Norris-La Guardia Act, 29 U.S.C. 101 et seq. (R. 35-43).

STATEMENT OF THE CASE

The Pleadings

The complaint was filed on June 4, 1965 by the Spokane, Portland & Seattle Railway Company and its two wholly-owned subsidiaries, Oregon Trunk Railway and Oregon Electric Railway Company (R. 1-2). These three corporations enter into collective bargaining agreements as a common entity known as the "SP&S Railway Company System Lines" (R. 2) and will be hereinafter referred to as SP&S.

The defendants named in the complaint are a labor organization, the Order of Railway Conductors and Brakemen, and six officers of that organization (R. 3). The Order of Railway Conductors and Brakemen is and at all times here material has been the duly recognized representative for purposes of collective bargaining of the classes and crafts of employees of the SP&S known as conductors and brakemen (R. 3) and will be hereinafter referred to as ORC&B.

The complaint alleged that rates of pay, rules and

working conditions of conductors and brakemen are governed by the provisions of collective bargaining agreements and amendments thereto (R. 4). The complaint quotes at length the pertinent provisions of several agreements which are alleged to govern the matter of accommodations for crews away from home (R. 4-6), asserts that the carriers have complied fully with all their agreements, including these (R. 4-8), but that a dispute has as to whether the accommodations the carriers propose to furnish are suitable or the allowance in lieu thereof is equitable (R. 7). The complaint attaches as Exhibit D (R. 21) a notice dated August 3, 1964, served by the ORC&B upon SP&S under Section 6 of the Railway Labor Act in which ORC&B proposed that SP&S agree to provide the following:

“(1) A large single room, well ventilated, heated, lighted, air conditioned, with bath facilities, well finished wood or carpeted floors and closet or large locker storage space. Room is to be equipped with chairs and dresser and full size standard bed with new Simmons 400 mattress and springs, or one of equal quality. Room to be maintained in a suitable manner with linen to be changed after each use.

“(2) The lodging mentioned in Paragraph (1) to be located not more than one-fourth mile from point where crews are required to register on and/or off duty, or suitable transportation furnished between lodging and points of reporting for duty or going off duty. Call service will be provided by carrier.

“(3) In lieu of requirements of above Paragraphs (1) and (2), an equitable allowance per trip will be six dollars (\$6.00) to be paid by check separate and apart from wages and earnings.”

The complaint alleges that ORC&B on November 12, 1964, invoked the mediatory procedures of the National Mediation Board as provided by Section 6 of the Railway Labor Act, in support of its efforts to secure agreement to the above quoted proposal, that on the same date the National Mediation Board advised SP&S of this action and requested a statement from the carriers with respect to "Organization's Section 6 notice of August 3, 1964, requesting adoption of certain rules governing lodging facilities," and that SP&S on November 16, 1964 replied to the National Mediation Board requesting that the National Mediation Board reject the organization's application for its mediatory services (R. 8, 18-20).

The complaint further alleges that on June 3, 1965, the ORC&B gave notice to the National Mediation Board of a strike scheduled for June 7, 1965 to secure adoption of the above quoted proposal of August 3, 1965 (R. 9), and that SP&S, by letter dated June 3, 1965 filed an ex parte submission with the SP&S-ORC&B Special Board No. 434 of the following claim (R. 9, 22):

"That the arrangements made by the Management of the Spokane, Portland and Seattle Railway Company as described in Superintendent's Circular No. 65, dated July 24, 1964, effectively discharge this Carrier's obligation under Section 1, Article II, 'Expenses Away From Home,' of the National June 25, 1964 Agreement between the railroads of the nation generally and the operating labor organizations."

The complaint prayed that the court enjoin the foregoing threatened strike as over a minor dispute (R. 13-14).

On June 4, 1965, the court below, without notice to the defendants, issued a temporary restraining order enjoining the strike (R. 31-34).

In their answer the defendants asserted that the complaint shows on its face that the dispute, as to which a strike is threatened, concerns a proposed change in the existing collectively bargained agreements based upon a proper notice from the ORC&B to the carriers in accordance with the provisions of Section 6 of the Railway Labor Act (R. 35-36), that this court lacks jurisdiction of the subject matter because this dispute is a labor dispute within the meaning of the Norris-La Guardia Act, 29 U.S.C. 101, 104, 108 and 113 and a major dispute within the meaning of the Railway Labor Act rather than a minor dispute (R. 36), that the SP&S-ORC&B Special Board No. 434 has no jurisdiction to entertain the dispute which SP&S attempted to submit to it (R. 38), that by its notice of August 3, 1964 ORC&B proposes to amend the existing collectively bargained agreements between SP&S and ORC&B so as to require SP&S to provide the specifically described lodging conditions away from home or an allowance of \$6.00 per trip in lieu thereof (R. 39-40), that in the absence of mediation under the auspices of the National Mediation Board the defendants are free to call a strike in support of their Section 6 Notice (R. 42) and that the Circular No. 65 issued by the SP&S on July 24, 1964 was not preceded by any negotiation with ORC&B and was not agreed to by the defendants but was issued entirely unilaterally by SP&S (R. 42).

On July 3, 1965 the SP&S filed a supplemental complaint alleging that on the same date the plaintiffs have filed an ex parte submission before the First Division of the National Railroad Adjustment Board (R. 54), a copy of which submission was attached (R. 56-98) and showed the attempted submission to the NRAB, First Division of the same claim theretofore submitted to Special Board No. 434, namely the following claim (R. 56):

“That the arrangements made by the management of the Spokane, Portland and Seattle Railway Company as described in Superintendent’s Circular No. 65 dated July 24, 1964 (Carrier’s Exhibit ‘A’) effectively discharge this Carrier’s obligation under Section 1, Article II—‘Expenses Away from Home’ of the National June 25, 1964 Agreement between the Railroads of the nation generally and the operating labor organizations.”

The Hearing

The court below conducted a hearing upon the motion for preliminary injunction during the course of which it received in evidence copies of all the pertinent agreements, correspondence and government reports (Tr. 5-6) and heard argument of counsel.

Findings of Fact

The court below made extensive findings of fact, which amounted in most part to a restatement of the allegations of the complaint as findings of fact plus a chronological setting forth of the exhibits introduced in evidence (A. 100-115).

Conclusions of Law

The court below concluded that "The dispute between plaintiffs and defendant ORC&B is a minor dispute under the provisions of the Railway Labor Act, as amended (45 U.S.C. Section 151 et seq.), and as such is properly referable to an appropriate tribunal under Section 3 of that Act for adjudication of such disputes, in the event the parties are unable to reach agreement thereon," that "A strike by defendant ORC&B to compel agreement on said disputes is unlawful and enjoined" and that "Plaintiffs are entitled to a temporary injunction in this cause restraining and preventing defendants from striking or otherwise interfering with plaintiffs' operations over the interpretation or application of Article II, Section 1, of the agreement of June 25, 1964, until the final order of this Court" (R. 115).

The Temporary Injunction

On August 3, 1965, the court below issued a temporary injunction enjoining and restraining the defendants until further order of the court from conducting or permitting any strike or work stoppage on the SP&S (R. 116-118).

SPECIFICATION OF ERRORS RELIED UPON

1. The court below erred in determining that the threatened strike was for the purpose of compelling agreement with respect to a minor dispute.

2. The court below erred in determining that the threatened strike was for the purpose of compelling agreement with respect to any dispute which was properly referable to any tribunal under Section 3 of the Railway Labor Act.

3. The court below erred in determining that the strike here threatened was unlawful and enjoicable.

4. The court below erred in failing to determine that the threatened strike was for the purpose of securing agreement of the SP&S to amend its prior agreements to provide for the type of lodging and allowance proposed by ORC&B in its notice of August 3, 1964.

5. The court below erred in failing to determine that the notice of ORC&B dated August 3, 1964 was a proper notice of ORC&B dated August 3, 1964 was a proper notice under Section 6 of the Railway Labor Act, 45 U.S.C. 156.

6. The court below erred in holding that it had jurisdiction to enjoin a strike because the Norris-La Guardia Act, 29 U.S.C. 101 et seq. removed all such jurisdiction from the court below.

7. The court below erred in failing to hold that the threatened strike presented a labor dispute within the meaning of the Norris-La Guardia Act, 29 U.S.C. 101 et seq.

8. The court below erred in finding (R. 102-103) that the plaintiffs had duly performed all the terms and conditions contained in each agreement on their part to be performed and are ready, willing, and able to continue to do so, whereas the National Agreement of June 25,

1964 imposed upon the plaintiffs the duty to negotiate on a local basis with respect what constitutes suitable lodging or equitable allowance in lieu thereof but plaintiffs have at all times refused to so negotiate and instead promulgated unilaterally their own declaration of what they will provide as lodging or allowance in lieu thereof.

9. The court below erred in issuing the temporary injunction.

ARGUMENT

I

The Norris-La Guardia Act, 29 U.S.C. 101, et seq., deprived the court of jurisdiction to enjoin the strike here involved.

A

The labor dispute with respect to which the ORC&B threatened to strike is not the same labor dispute as the one which SP&S attempted to submit to the adjustment boards.

The court below erroneously assumed that only one labor dispute was here involved. The labor dispute which SP&S attempted to submit first to SP&S-ORC&B Special Board No. 424 (R. 22), and then to the National Railroad Adjustment Board, First Division (R. 56), is defined by the claim set forth by SP&S in its submissions. The claim set forth in each submission is identical and reads as follows:

“That the arrangements made by the Management of the Spokane, Portland and Seattle Railway Company as described in Superintendent’s Circular

No. 65, dated July 24, 1964, effectively discharge this Carrier's obligation under Section 1, Article II, 'Expenses Away From Home,' of the National June 25, 1964 Agreement between the railroads of the nation generally and the operating labor organizations."

The pertinent provisions of the National Work Rules Agreement of June 25, 1964, to which the claim has reference when it speaks of "National June 25, 1964 Agreement," are as follows (R. 44).

"Article II—Expenses Away From Home:

"Section I—

"When the carrier ties up a road service crew (except short turnaround passenger crews) or individual members thereof, at a terminal (including tieup points named by assignment bulletins, or presently listed in schedule agreements, or observed by practice, as regular points for tying up crews) other than the designated home terminal of the crew assignment for four (4) hours or more, each member of the crew so tied up shall be provided suitable lodging at the carrier's expense or an equitable allowance in lieu thereof. *Suitable lodging* or an equitable allowance in lieu thereof shall be worked out on a local basis. The equitable allowance shall be provided only if it is not reasonably possible to provide lodging.

"If an allowance is being made in lieu of lodging as well as other considerations under provisions of existing agreements, the amount attributed only to lodging shall be removed if suitable lodging is supplied, or offset against an equivalent allowance. This shall be worked out on a local basis.

"The provisions of this Section shall be made effective at a date no later than 30 days following the effective date of this Agreement.

* * * * *

"Article VII—Settlement of Disputes:

"Any disputes involving the interpretation or application of this Agreement shall be settled by the parties in accordance with the established procedures therefor, including the creation of Special Boards of Adjustment and other procedures of Section 3 of the Railway Labor Act.

* * * * *

"Article VIII—Effect of This Agreement:

"This agreement shall become effective upon ratification by all of the organizations signatory hereto except that upon such ratification the adjustments in rates of pay provided by Article IV shall be effective as of May 7, 1964, and the requirements of Section 1 of Article II with respect to the furnishing of suitable lodging or an equitable allowance in lieu thereof shall be made effective at a date no later than 30 days following such ratification.

"This agreement is in settlement of the dispute growing out of notices served by the carriers listed in Exhibit A, B and C on or about November 2, 1959, and by the organization signatory hereto on September 7, 1960, as implemented by notices of April 6, 1961, not including issues disposed of by the Award of Arbitration Board No. 282, and shall remain in effect until changed or modified in accordance with the provisions of the Railway Labor Act, as amended, except that rates for miles in excess of those comprising the basic day shall remain unchanged until January 1, 1968.

"This agreement shall be construed as a separate agreement by and on behalf of each carrier party hereto and those employees represented respectively by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Engineers, Order of Railway Conductors and Brakemen, Brotherhood of Railroad Trainmen, and the Switchmen's Union of North America, as heretofore stated; and shall remain in effect until changed or modified in accordance with the provisions of the Railway Labor Act, as amended."

Superintendent's Circular No. 65, dated July 24, 1964, which the claim asserts constitutes full compliance with Section 1, Article II of the National Work Rules Agreement of June 25, 1964, was unilaterally promulgated by SP&S instead of working out on a local basis the suitable accommodations or allowance in lieu thereof as provided in the national agreement (R. 6-7, 42). Although during the period from June 25, 1964 through July 24, 1964 plaintiffs met twice with ORC&B General Chairman Delaney with respect to the subject matter of Article II of the National Work Rules Agreement of June 25, 1964, the plaintiffs refused to negotiate or give good faith consideration to any of the proposals of the ORC&B for a specification of the lodgings or allowance in lieu which would be acceptable to the employees represented by ORC&B (R. 42). Instead of bargaining in good faith SP&S insisted that it had a right to conduct a survey of the quarters used by the men when they had no allowance for lodging and treat whatever quarters the men had used under these conditions of adver-

sity as actually suitable (R. 6-7, 60-68). Superintendent's Circular No. 65 reads as follows (R. 16):

**"SPOKANE, PORTLAND AND SEATTLE
RAILWAY COMPANY SYSTEM LINES**

"Portland, Oregon
July 24, 1964

"Circular No. 65

"ALL CONCERNED:

"Effective July 25, 1964 and until further notice, whenever a road service crew is tied up at a terminal other than the designated home terminal of the crew assigned for four hours or more, each member of the crew so tied up will be provided lodging at the following locations:

Spokane—Couer d'Alane Hotel

Pasco—Pioneer Hotel

Wishram—SPS Hotel

Bend—Colonial Hotel

Albany—Albany Hotel

Eugene—Lane Hotel

Astoria—Astor Hotel

Seaside—Chillquist Rooming House

Vernonia—Hy-van Hotel

"A survey recently taken of lodging then being used by train and enginemen at the above points indicated that while some were using accommodations listed above, others had made different lodging arrangements. Therefore, although accommodations will be available at the above-named establishments, if any crew member desires to keep his present arrangement, he may do so in which event he will be allowed \$1.50 for each layover period

during which he is tied up for more than four hours at the away-from-home terminal of his assignment. This allowance may be claimed on the service slip for the particular trip.

"While the above arrangement is in effect, the allowance in lieu of lodging presently being made to certain train crew members in pooled caboose territory will be removed.

"J. L. Monahan
Superintendent"

The labor dispute which SP&S has attempted to submit to the adjustment boards is whether the arrangements set forth in Superintendent's Circular No. 65 constitute suitable lodgings or an equitable allowance in lieu thereof within the meaning of Section 1, Article II of National Work Rules Agreement of June 25, 1964.. We will here mention various grounds upon which ORC&B relies in contesting jurisdiction of the adjustment boards over this claim, although these are immaterial for the purposes of our argument that the dispute submitted to the adjustment boards is completely separate and distinct so far as concerns the legal issues here involved. As to both adjustment boards the claim was not ripe for submission since there had never been handling in the usual manner on the property. Negotiations on the property are a condition precedent to adjustment board jurisdiction by reason of the provisions of Section 3, First (i) of the Railway Labor Act, 45 U.S.C. 153, First (i), which requires that all disputes "growing out of grievances or out of the interpretation or application

of agreements * * * shall be handled in the usual manner up to and including the Chief Operating Officer of the carrier designated to handle such disputes" before they become referable to an adjustment board.

SP&S-ORC&B Special Adjustment Board No. 434 clearly had no jurisdiction as it was limited to handling "pending time claims and grievances, "that is cases in existence on the date of its creation, namely October 20, 1961 (R. 40-41, 45-47) and to cases submitted by mutual agreement of the parties" (R. 40-41, 45-47). The claim here attempted to be submitted to Board No. 434 was neither pending on October 20, 1961 nor submitted by mutual agreement of SP&S and ORC&B (R. 41).

Assuming however that the claim stated in the submissions filed by SP&S with Special Board No. 434 and with the National Railroad Adjustment Board, First Division, was properly before one or the other or both of these adjustment boards, this would be completely irrelevant to the issue of the enjoining of the threatened strike. As all of the pleadings and correspondence in this case make plain, the threatened strike was to be called for the purpose of securing an amendment of existing collective bargaining agreements so as to obligate SP&S for the future to provide the accommodations or allowance requested in the Section 6 notice served by ORC&B on August 3, 1964. This notice reads as follows (R. 21):

"August 3, 1964

"Mr. N. S. Westergard,
Vice President and General Manager
Spokane, Portland and Seattle Railway Co.
1101 N. W. Hoyt Street
Portland 7, Oregon

"Dare Mr. Westergard,

"Our negotiations to date have failed to produce an agreement as to the type, quality or location of suitable lodging, or equitable allowance in lieu thereof. We propose that an agreement be reached in accord with Section 6 of the Railway Labor Act, which will provide that acceptable suitable lodging shall include:

"(1) A large single room, well ventilated, heated, lighted, air conditioned, with bath facilities, well finished wood or carpeted floors and closet or large locker storage space. Room is to be equipped with chairs and dresser and full size standard bed with new Simmons 400 mattress and springs, or one of equal quality. Room to be maintained in a suitable manner with linen to be changed after each use.

"(2) The lodging mentioned in Paragraph (1) to be located not more than one-fourth mile from point where crews are required to register on and/or off duty, or suitable transportation furnished between lodgings and points of reporting for duty or going off duty. Call service will be provided by carrier.

"(3) In lieu of requirements of above Paragraphs (1) and (2), an equitable allowance per trip will be six dollars (\$6.00) to be paid by

check separate and apart from wages and earnings.

"Please advise me promptly whether you are agreeable to these provisions, or as to a date for conference concerning this proposal, as provided by the Railway Labor Act.

"Very truly yours,

/s/ T. M. DELANEY
T. M. DELANEY
General Chairman"

This notice seeks agreement as to provisions to govern future relations. The claim which SP&S attempted to submit to the adjustment boards looks to the past—did SP&S violate the contract by providing certain lodgings or allowance in lieu thereof which were not in fact suitable or equitable? The difference between the two disputes is apparent from the fact that whether the adjustment board rules SP&S did or did not violate its contract by providing the lodgings and allowance set forth in its Superintendent's Circular No. 65, neither ruling would be at all inconsistent with ORC&B's right to attempt for the future to secure other lodgings or allowances desired by the employees it represents.

That the threatened strike was directed solely to the securing of the lodgings and allowance in lieu thereof as specified in the Section 6 notice of ORC&B dated August 3, 1964 is undisputed in the record. At no place do the plaintiffs ever even accuse defendants of threatening to strike over the Superintendent's Circular No. 65, dated July 24, 1964, the propriety of which is the

only issue which the plaintiffs have attempted to submit to the adjustment boards. The claim stated by plaintiffs to the adjustment boards is consistent and makes no mention of ORC&B's proposal of August 3, 1964. The allegations of the complaint with respect to the object of the threatened strike are as follows (A. 9):

"By telegram dated June 3, 1965, defendant ORS&B gave notice to the National Mediation Board that it was authorizing a withdrawal from service by employees of plaintiffs on July 7, 1965, at 6:00 a.m. to enforce its position * * * as set forth in defendant ORC&B's notice to plaintiffs of August 3, 1965."

"The position asserted by defendants concerning what constitutes suitable lodging and an equitable allowance in lieu thereof under the agreement of June 25, 1964, as set forth in defendant ORC&B's notice to plaintiffs of August 3, 1964, is the subject matter of the controversy between defendants and plaintiffs, the object of defendants' threatened strike action, * * *"

The telegram of ORC&B dated June 2, 1965 notifying the National Mediation Board of the threatened strike likewise made no mention of the Superintendent's Circular No. 65 dated July 24, 1964 but limited the object of the strike to the Section 6 notice of the ORC&B dated August 3, 1964. This telegram stated the object of the strike as (R. 113):

"Account of Carriers refusal to bargain realistically on our Section 6 notice of August 3, 1964"

From the foregoing it is evident the threatened strike

involved a labor dispute which had not been submitted to the National Railroad Adjustment Board. Even if the threatened strike were over a minor dispute which could be properly referred to an adjustment board, so long as it had not in fact been referred, the Norris-LaGuardia Act bars an injunction to enjoin the strike. *Manion v. Kansas City Terminal Ry. Co.*, 353 U.S. 927; *Brotherhood of Locomotive Engineers v. L. & N.R. Co.*, 373 U.S. 33, 39-40, n. 11.

Nor can a carrier confer jurisdiction on the federal courts to enjoin a threatened strike over a major dispute by submitting any or all of the dispute to the National Railroad Adjustment Board. *Missouri-Illinois R. Co. v. Order of Railway Conductors*, 8th Cir., 1963, 322 F.2d 793, 797. That case, paralleling the instant case, involved the attempt of the carrier to raise issues as to the applicability of a national agreement to bar a strike over a local effort to bargain. In that case, as here, the issue of the interpretation of the national agreement was submitted to the Adjustment Board. The district court and the court of appeals ruled that the Norris-La Guardia Act barred an injunction even though there were pending before the National Railroad Adjustment Board questions as to the interpretation of the national agreement relating to the right to bargain about new terms. The relevant facts in that case were stated by the Court as follows (322 F.2d 793, 794-95):

“The local dispute began in July of 1961, while the national dispute was still in progress. Appellee served Section 6 notices under the Railway Labor Act (45 U.S.C.A. 156) requesting increases in rates

of pay, to be effective August 20, 1961 for brakemen, and August 20, 1961 for conductors, on work assignments paid for on an hourly basis. * * * Plaintiff, * * * claimed that the requests of defendant unions were barred by a provision of the 1960 mediation agreement which fixed rates of pay until November 1, 1961. It also urged that under the national moratorium agreement and local bargaining agreement all brakemen and conductor assignments are paid on a mileage rather than on an hourly basis; and therefore, defendants were requesting rates of pay for job assignments which did not exist. * * *

* * * On August 20, 1962, the ORC&B notified the plaintiff of its intention to strike the following Monday, and a similar notice was sent plaintiff by the B of RT. On August 24, 1962, plaintiff filed these actions, asking the District Court to enjoin the threatened strike. Subsequent thereto, on August 27, 1962, plaintiff submitted to the National Railroad Adjustment Board, pursuant to Section Three, First (i) of the Act (45 U.S.C.A. 153, First (i)) the following questions, as reflected in appellant's brief:

“(a) Did Article IV of Agreement dated June 4, 1960, known as Mediation Agreement Case A-6081 and Article VI of Agreement dated June 22, 1960, known as Mediation Agreement Case A-6614, prohibit the serving of notice for increase in rates of pay for conductors effective August 20, 1961, and for brakemen effective August 26, 1961?

“(b) Does the Basic Agreement of December 1, 1956, applicable to conductors and the Basic Agreement of August 1, 1956, applicable to brakemen, make provision for conductor and brakemen

assignments to be paid on an hourly basis?’

“Thereafter, on August 29, 1962, plaintiff amended its complaint to reflect its submission of the dispute to the Adjustment Board and alleged that defendants were unlawfully attempting to enforce their own interpretation of existing agreements by means of a strike when such dispute had been submitted to the Adjustment Board.”

It will be noticed that there as here, the carrier accused the employees of attempting to enforce “their own interpretation” of the existing agreements by means of a strike. The court distinguished between the issue of interpretation which was submitted to the Adjustment Board and the effort to obtain new terms which was a different labor dispute (322 F.2d at p. 797).

B.

The labor dispute with respect to which ORC&B threatened to strike is a major dispute.

The ORC&B is making no contention that its members have any right under existing agreements to an air conditioned room, a new Simmons 400 mattress or calls from the carrier to wake and send them on their way or any of the other terms proposed by its Section 6 Notice dated August 3, 1964 (R. 21). Rather these are admittedly new terms proposed as the basis for an agreement to be effective in the future. The reference to Section 6 of the Railway Labor Act in the notice of August 3, 1964 (R. 21) leaves no ambiguity. Sections 6 of the Railway Labor Act, 45 U.S.C. 156, provides:

“Carriers and representatives of the employees shall give at least thirty days’ written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.”

Here at the time of the threatened strike more than ten days had elapsed after the termination of conferences, the carriers had not requested the services of the Mediation Board and the Mediation Board had not proffered its services. Hence, the employees were entirely free to strike.

This Court in the case of *Butte, Anaconda & P. Ry. Co. v. Brotherhood of Locomotive Firemen and Engineers*, 9th Cir., 268 F.2d 54, certiorari denied, 361 U.S. 864, carefully and accurately quoted and applied the applicable authorities distinguishing a major and a minor

dispute. This Court there stated (268 F.2d at pp. 55, 58-59):

“The principal questions presented here involve aspects of the Railway Labor Act, 45 U.S. C.A., sec. 151 et seq. They are: (1) Whether the controversy was a major or minor dispute under that act; * * *”

“At the outset it is necessary to note the distinction between so-called major and minor disputes under the Railway Labor Act. In *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. 711, 723, 65 S. Ct. 1282, 1290, 88 L. Ed. 1886, the difference between these two kinds was explained as follows:

“ ‘The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

“ ‘The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement. * * *

“As to both kinds of dispute, the act requires

that the parties enter into negotiation as the first step towards settlement of the controversy. Where negotiation fails, the procedures diverge. Major disputes go first to mediation before the National Mediation Board; if that fails, then to acceptance or rejection of arbitration; and finally to possible presidential intervention. If all this fails, compulsory processes are at an end, and either party may resort to help-help. *Elgin, Joliet & Eastern Railway Co. v. Burley*, *supra*, 325 U.S. at 65 S. Ct. at page 1290, page 725. The Norris-La Guardia Act prohibits the issuance of an injunction in a railway labor case involving a "major dispute." *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S. 30, 42, 77 S. Ct. 635, 1 L. Ed. 622.

"In the case of minor disputes, if negotiation fails either party may submit the matter to appropriate division of the National Railroad Adjustment Board."

In *Order of Railroad Telegraphers v. Chicago N.W. R. Co.*, 362 U.S. 330, 336, the Supreme Court stated:

"Plainly the controversy here relates to an effort on the part of the union to change the 'terms' of an existing collective bargaining agreement."

The Supreme Court summarily rejected the carrier's contention that a minor dispute was involved, stating (362 U.S. at p. 341):

"Only a word need be said about the railroad's contention that the dispute here with the union was a minor one relating to the interpretation of this contract and therefore one that the Railway Labor

Act requires to be heard by the National Railroad Adjustment Board. We have held that a strike over a 'minor dispute' may be enjoined in order to enforce compliance with the Railway Labor Act's requirement that minor disputes be heard by the Adjustment Board. *Brotherhood of Railroad Trainmen v. Chicago River & I. R. Co.*, 353 U.S. 30. But it is impossible to classify as a minor dispute this dispute relating to a major change, affecting jobs, in an existing collective bargaining agreement rather than to mere infractions or interpretations of the provisions of that agreement. Particularly since the collective bargaining agreement which the union sought to change was a result of mediation under the Railway Labor Act, this is the type of major dispute that is not governed by the Adjustment Board."

To the same effect see *Missouri-Illinois R. Co. v. Order of Railway Conductors*, 8th Cir., 1963, 322 F.2d 793, 796-797, heretofore discussed at length in Point I, Sub-joint A, *supra*. The Court there stated 322 F.2d at pp. 795, 797:

"The case was heard before the United States District Court for the Eastern District of Missouri, on October 1, 1962.

"At that time, plaintiff reiterated its reasons for believing that the unions' demands were improper. It argued, as stated, that the demands were in violation of the moratorium provisions of the national mediation agreement; and that the rates of pay requested were for job assignments that did not exist, as the entire subject of rates of pay for existing jobs was already a matter of present agreement be-

tween the parties. Hence, it contended that the dispute involved here was a 'minor' one and thereby within the exclusive jurisdiction of the Adjustment Board.

* * * * *

"That the dispute in the case at bar involves a proposed change in rates of pay for the plaintiff's employees engaged in 'road-switching' is apparent from appellant's complaint, where it is alleged that the 'request for a change (was) in rates of pay related to conductor assignments which are paid on an hourly basis as set out in (the National) Mediation cases . . .' Notwithstanding, appellant would have us rule that although such a request began as a major dispute, it later developed into a minor one as a result of the differences between the parties concerning the interpretation of the 1960 National Mediation Agreement governing the fixing of rates of pay, etc. Thus, it says, as the dispute centers about the 'interpretation or application of agreements concerning rates of pay, rules, or working conditions,' it is therefore a minor dispute submittable to the Adjustment Board. (45 U.S.C.A. 153 First (i)).

* * * * *

"That a dispute over wage rates, though based on a previously existing agreement between the parties, is the type of dispute Congress intended to leave to non-compulsory arbitration, is made manifest in *Elgin J & E R. Co. v. Burley*, *supra*. Merely because the dispute may be related to a change in an existing agreement that had not yet terminated does not, *a fortiori*, make the dispute a minor one."

The National Mediation Board has ruled that similar requests by labor organizations for local agreements specifying in more detail suitable lodging or an equitable allowance in lieu thereof pursuant to the yardstick for bargaining contained in Section 1 of Article II of the National Work Rules Agreement of June 25, 1964, constitute proper Section 6 notices. See for instances the notice served by the ORC&B on the Denver & Rio Grande Western Railroad Company on August 14, 1964, a copy of which is printed as Appendix B to this brief, pp. 35-36, *infra*, the protest of the carrier thereto dated August 21, 1964, a copy of which is printed as Appendix C to this brief, pp. 37-38, *infra*, and the ruling of the National Mediation Board dated July 29, 1965, that "Notice of August 14, 1964 served by the ORC&B * * * is a proper notice served in accordance with Aection 6 of the Railway Labor Act," a copy of which ruling is printed as Appendix D to this brief, pp. 39-40, *infra*.

The ORC&B and the BRT each served a similar notice on the L & N Railway on September 14, 1964, copies of which are printed as Appendix E and Appendix F to this brief, pp. 43-44, *infra*, the National Mediation Board on April 14, 1965 ruled these were proper Section 6 notices, a copy of which ruling is printed as Appendix G to this brief, pp. 45-46, *infra*, and the L & N and the BRT thereafter on July 6, 1965 reached an agreement in settlement of their dispute, a copy of which is printed as Appendix H to this brief, pp. 47-55, *infra*.

Thus both by its intrinsic nature and by rulings of

the National Mediation Board on almost identical notices, the notice of August 3, 1964 served by ORC&B on the SP&S must be held a proper Section 6 notice. As a consequence a strike in support thereof constitutes a major dispute and the federal courts are without jurisdiction to enjoin the strike.

C.

The labor dispute with respect to which the ORC&B threatened to strike is not properly enjoinable even if it is a minor dispute because it has never been submitted to an adjustment board.

The federal courts are equally without jurisdiction to enjoin a strike in a minor dispute as in a major dispute, unless the minor dispute is pending before an adjustment board. *Manion v. Kansas City Terminal R. Co.*, 3353 U.S. 929; *Brotherhood of Locomotive Engineers v. L. & N. R. Co.*, 373 U.S. 33, 39-40, n. 11.

The strike here was in support of the demands made in the ORC&B's letter of August 3, 1964. Assuming these demands by some stretch of the imagination can be construed as an effort to achieve a preferred construction of the terms suitable lodging and equitable allowance contained in the June 25, 1964 National Work Rules Agreement, admittedly the issue of whether the lodgings and allowance specified in the August 3, 1964 letter are suitable and equitable within the meaning of the June 25, 1964 agreement, has not been submitted to any adjustment board. Hence the Norris-LaGuardia Act, 29 U.S.C.

101 et seq., is applicable and deprives the federal courts of jurisdiction to enjoin the strike.

If the strike could by any stretch of the imagination be said to be against a holding that accommodations and allowances specified in the Superintendent's Circular No. 65 were suitable and equitable, the failure to handle this Circular by negotiation on the property in accordance with established practice up to the highest carrier operating officer designated to handle such disputes as required by Section 3 (First, (i) of the Railway Labor Act, 45 U.S.C. 153, First (1), deprives the adjustment boards of jurisdiction. Therefore even this claim is not properly pending before an adjustment board and the Norris-LaGuardia Act, 29 U.S.C. 101, et seq., bars an injunction.

D.

Even if it be held that the threatened strike relates to the labor dispute which has been submitted to the adjustment board, since the threatened strike is over a major dispute the submission to the adjustment board does not endow the court with jurisdiction to enjoin the strike.

While we believe that we have thoroughly demonstrated that the threatened strike involves a labor dispute wholly separate and distinct from the labor dispute which SP&S has attempted to submit to an adjustment board, even if the disputes are related, since the threatened strike is directed to the achievement of an amendment of the contract to fix the specific details

of the lodgings or allowance in lieu thereof for the future, the strike involves a major dispute and may not be enjoined. The holding of the United States Court of Appeals for the Eighth Circuit in the case of *Missouri-Illinois R. Co. v. Order of Railway Conductors*, 322 F.2d 793, constitutes a sound and well reasoned ruling that the presence in a dispute of issues of interpretation for an adjustment board does not deprive the efforts of a union to achieve an amendment of a contract looking to the future of its character of a major dispute.

In the *Missouri-Illinois* case, as here, the carrier refused to negotiate with respect to a local Section 6 notice on the ground that a national agreement properly construed barred the requested charges. There the carrier submitted to an adjustment board its contention that the national agreement barred the local Section 6 notice. Here no such issue has been submitted to the adjustment board. Thus the interrelationship of the Section 6 notice to the adjustment board dispute was much closer in the *Missouri-Illinois* case than in the instant case. Nevertheless the Eighth Circuit held that no injunction could issue.

Upon both reason and authority we respectfully submit that no aspect of the claim before the adjustment boards, even assuming the claim has been properly submitted, deprives the efforts of the ORC&B to achieve an agreement for the future providing for the lodging and allowance specified in its August 3, 1964 notice of its basic character as a major dispute. Once it is recognized that this effort had the character of a major dispute, the

courts' lack jurisdiction to enjoin these efforts is beyond dispute.

II

Under the provisions of Section 7 of the Norris-La Guardia Act, 29 U.S.C. 107, the ORC&B is entitled to attorney's fees and expenses upon its successful defeasance of a suit for injunction.

We respectfully request that upon the reversal of the injunction below the ORC&B be awarded attorney's fees and the expense of this suit. Section 7 of the Norris-LaGuardia Act, 29 U.S.C. 107 authorizes such an award. *Elgin Joliet & E. Ry Co. v. Brotherhood of Railroad Trainmen*, 7th Cir., 1962, 302 F.2d 540, 545.

CONCLUSION

For the foregoing reasons it is respectfully urged that the temporary injunction issued below be reversed with an award to the ORC&B of attorney's fees and expenses of this litigation.

CLIFFORD D. O'BRIEN
514 Corbett Building
Portland, Oregon 97204

HARRY J. WILMARTH
Merchants National Bank Building
Cedar Rapids, Iowa

Attorneys for Appellants

October 1, 1965

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CLIFFORD D. O'BRIEN

APPENDIX A

List of Exhibits, all of which were identified, offered and received in evidence at Tr. 5-6.

Plaintiff's Exhibits:

- No. 1 Carriers' & Organizations' Notices of 1959 and 1960
- No. 2 Agreement of 11-17-60
- No. 3 Report of the Presidential Railroad Commission
- No. 4 Mediation Document of 4-21-64
- No. 5 Statement and Determination of the Mediators, 5-7-64
- No. 6 Agreement of 7-25-64
- No. 7 Agreement Establishing Board Number 434
- No. 8 Delaney Letter to Westergard of 8-10-64
- No. 9 Westergard Reply to Delaney of 10 August '64
- No. 10 Circular No. 65
- No. 11 September 15, 1964 Status Quo Agreement
- No. 12 Letter from Delaney to Westergard 12-7-64
- No. 13 5-23-52, National Pooled Caboose Agreement
- No. 14 4-10-58, Pooled Caboose Agreement S.P.& S.-ORC&B
- No. 15 S.P.& S. Letter to Douglass, 6-23-65, and attachment

- No. 16 Delaney to Westergard 11-10-64
- No. 17 Westergard Reply to Delaney 11-23-64
- No. 18 Letter from the Three Organizations 7-23-64
- No. 19 Agreement of November 25 and 27 between S.P.&S. and B. of L.F.&E. and B. of L.E., were received in evidence

Defendant's Exhibits:

- No. 1 L & N Notice by ORC & B of 9-14-64
- No. 2 National Mediation Board Letter of 4-14-65 to L. & N.
- No. 3 Harris Telegram to Delaney, 9-15-64
- No. 4 Wolfe Letter to Ganser, 11-12-64
- No. 5 Wolfe Letter to Organization Presidents of 4-30-65
- No. 6 Unidentified Letter of 5-13-64 to Wolfe

APPENDIX B

GENERAL COMMITTEE OF ADJUSTMENT
ORDER OF RAILWAY CONDUCTORS
AND BRAKEMEN

Denver and Rio Grande Western Railroad Co.
Colorado and Southern Railway Co.
Utah Railway Co.

W. D. Hopkins
General Chairman
August 14, 1964

Mr. R. D. Wolfe, Assistant to Vice-President
The Colorado and Southern Railway Company
Denver, Colorado

Re: 13-X - June 25, 1964 Agreement
Section 1 of Article II

Dear Sir:

Our negotiations to date have failed to produce an agreement as to the type, quality or location of suitable lodging, or equitable allowance in lieu of the Railway Labor Act, which will provide that acceptable suitable lodging shall include:

(1) A large single room, well ventilated, heated, lighted, air conditioned, with bath facilities, well finished wood or carpeted floors and closet or large locker storage space. Room is to be equipped with chairs and dresser and full size standard bed with new Simmons 400 mattress and springs, or one of equal quality. Room to be maintained in a suitable manner with linen to be changed after each use.

(2) The lodging mentioned in Paragraph (1) to be located not more than one-fourth mile from point where crews are required to register on and/or off duty, or suitable transportation furnished between lodging and points of reporting for duty, or going off duty. Call service will be provided by carrier.

(3) In lieu of requirements of above Paragraphs (1) and (2), an equitable allowance per trip will be six dollars (\$6.00) to be paid by check separate and apart from wages and earnings.

Please advise me promptly whether you are agreeable to these provisions, or as to a date for conference concerning this proposal, as provided by the Railway Labor Act.

Yours truly
W. D. HOPKINS
General Chairman

cc:

G. H. Harris
D. G. Hoskins
J. C. Farrell

APPENDIX C**THE DENVER AND RIO GRANDE WESTERN
RAILROAD COMPANY**

P. O. Box 5482
Denver, 17, Colorado
Personnel Department

August 21, 1964

NRLC-6

Mr. W. D. Hopkins
General Chairman, ORC&B
Denver, Colorado

Dear Sir:

Regarding your purported Section 6 notice dated August 14, 1964, of desire to enter into an agreement providing for suitable lodging at away-from-home terminals.

The notice is improper and in fact involves the application of Article II of the Operating Employees' Agreement of June 25, 1964.

Your specific attention is directed to Article VII of the June 25, 1964 Agreement reading—

“Any dispute involving the interpretation or application of this Agreement shall be settled by the parties in accordance with the established procedures therefor, including the creation of Special Boards of Adjustment and other provisions of Section 3 of the Railway Labor Act.”

which makes the so-called Section 6 notice not only improper but a specific violation of the Agreement.

Further attention is directed to that part of Item 4, page 4, of the "Settlement and Determination of the Mediators" regarding the Agreement wherein it is said by Mediators that—

"We note, however, that this is a negotiated Agreement voluntarily entered into and therefore is a responsibility on the Parties in respect to their own interest and that of the Public view the Agreement as having established a relationship as concerns the issues included for at least the ensuing two years."

which is evidence that a notice such as yours will continue to be improper for the two-year period to which the Mediators refer. However, if you so desire, I will be agreeable to meeting with you September 15, 1964 at 10:00 A.M., Room 301, Rio Grande Building, 1531 Stout Street, Denver, Colorado, for the purpose of more fully explaining Carrier's position to you.

Yours truly,

E. B. HERDMAN

Director of Personnel

APPENDIX D

NATIONAL MEDIATION BOARD

Washington

July 29, 1965

NMB Case No. A-7477

Mr. E. B. Herdman, Director of Personnel
The Denver & Rio Grande Western Railroad Co.
Denver, Colorado 80217

Mr. G. H. Harris, President
Order of Railway Conductors & Brakemen
Cedar Rapids, Iowa 52401

Mr. P. S. Heath, Grand Chief Engineer
Brotherhood of Locomotive Engineers
1118 BLE Building
1365 Ontario Avenue
Cleveland, Ohio 44114

Gentlemen:

Reference is made to NMB Case No. E-298.

This Board was advised, on April 30, 1965, that the Order of Railway Conductors and Brakemen had authorized the peaceful withdrawal from service of employees represented by that organization on the Denver and Rio Grande Western Railroad Company at 6:00 a.m. that date. The organization advised that this withdrawal was due to the failure of the carrier to bargain concerning the employee's notice of August 14, 1964 relative to suitable lodging.

On April 30, 1965 the Board assigned NMB Case No. E-298 to this dispute and requested the organization to defer the proposed strike action.

The organization complied with this request. On May 27, 1965 the Brotherhood of Locomotive Engineers requested they be made a party to this case on the basis of a similar unresolved dispute with the carrier. Brotherhood of Locomotive Engineers was made a party to NMB Case E-298 and all parties were so advised.

Mediator Luther G. Wyatt was assigned to this case and commenced handling in Denver on July 12, 1965.

The Board has now had an opportunity to review this file and the notice of August 14, 1964 served by the ORC&B. On the basis of this review the Board has reached the conclusion that this is a proper notice served in accordance with Section 6 of the Railway Labor Act. Therefore, you are advised that NMB Case No. E-298 has been converted and docketed as NMB Case No. A-7477 and will be handled accordingly.

Very truly yours,

THOMAS A. TRACY
Executive Secretary

APPENDIX E**ORDER OF RAILWAY CONDUCTORS
& BRAKEMEN**

**GENERAL COMMITTEE OF ADJUSTMENTS
LOUISVILLE & NASHVILLE RAILWAY
802 HOFFMAN BUILDING
LOUISVILLE, KENTUCKY**

September 14, 1964

Mr. W. S. Scholl,
Director of Personnel,
Louisville & Nashville R. R. Co.,
908 West Broadway,
Louisville 1, Kentucky.

Dear Sir:

This has reference to Article II, Section I of National Agreement dated June 25, 1964. The issue of suitable lodging or an equitable allowance in lieu thereof was remanded to the local property for negotiations. Numerous conferences have been held on the subject matter but to date, have failed to produce an agreement as to the type, quality or location of suitable lodging or an equitable allowance in lieu thereof.

Pursuant to Section 6 of the Railway Act, please accept this Notice, effective thirty (30) days hereafter, to amend the existing Agreement covering crafts and classes of employees represented by the Order of Railway Conductors and Brakemen on the Louisville & Nashville Railroad (L. & N.—N.C. & St. L. Districts), which will provide that acceptable suitable lodging shall include:

(1) A large single room, well ventilated, heated, lighted, air conditioned, with bath facilities, well finished wood floor of carpeted floors and closet or large locker storage space. Room is to be equipped with chairs and dresser and full size standard bed with new Simmons 400 mattress and springs, or one of equal quality. Room to be maintained in a suitable manner with linen to be changed after each use.

(2) The lodging mentioned in Paragraph (1) to be located not more than one-fourth mile from point where crews are required to register on and/or off duty, or suitable transportation furnished between lodging and points of reporting for duty, or going off duty. Call Service will be provided by carrier.

(3) In lieu of requirements of above Paragraphs (1) and (2), an equitable allowance per trip will be six dollars (\$6.00) to be paid by check separate and apart from wages and earnings.

Please advise me promptly whether you are agreeable to these provisions, or as to a date for conference concerning this proposal, as provided by the Railway Labor Act.

Yours truly,

D. S. PANNELL,
General Chairman,
Order of Railway Conductors
and Brakemen.

APPENDIX F**GENERAL GRIEVANCE COMMITTEE
BROTHERHOOD OF RAILROAD TRAINMEN**

L. & N.. Railroad (N. C. & St. L. District)

September 28, 1964

Mr. W. S. Scholl
Director of Personnel
L&N Railroad Company
908 West Broadway
Louisville 1, Kentucky

Dear Sir:

In accordance with the provisions of Section 6 of the Railway Labor Act, you are hereby advised of our desire to amend the National Agreement dated June 25, 1964, Article 2, Section 1, for employees represented by the Brotherhood of Railroad Trainmen on the N.C. & St. L. District.

- (I) The amendment to read: When the carrier ties up a road crew or individual members thereof at a terminal, including any point that a work, wreck, (regular or extra) circus train, pool or regular assigned is tied up for any reason, other than their designated home terminal for 4 hours or more, the crew members so tied up will be provided suitable lodging at the carrier's expense, or an equitable allowance in lieu thereof.
- (II) Suitable lodging shall be: Single room, air conditioned, suitable furniture in each room, bath facilities in room, rooms to be

maintained in a suitable manner with change of linen after each use.

- (III) The lodging in Paragraph (II) to be located not more than one-fourth mile from point of going on and/or off duty, or transportation shall be furnished between points of lodging and reporting and going off duty. Call service shall be provided by the carrier.
- (IV) In lieu of lodging in the above paragraphs, an equitable allowance of six dollars (\$6.00) shall be paid each member of crews that are tied up in accordance with paragraph (I) above.

Please advise time and date that we may have a conference on the above.

Yours very truly,

O. B. GENTRY

General Chairman, BRT

Copy: Mr. C. Luna, Pres., BRT

APPENDIX G**NATIONAL MEDIATION BOARD**

Washington

April 14, 1965

Case A-7397 (Formerly E-291)

Mr. W. S. Scholl, Director of Personnel
Louisville & Nashville Railroad Company
908 West Broadway
Louisville, Kentucky

Mr. G. H. Harris, President
Order of Railway Conductors & Brakemen
Cedar Rapids, Iowa

Mr. Charles Luna, President
Brotherhood of Railroad Trainmen
Standard Building
Cleveland, Ohio

Gentlemen:

Reference is made to NMB Case No. E-291. On March 8, 1965 the Board was advised by the Order of Railway Conductors & Brakemen that a peaceful withdrawal from service of employees represented by that organization would take place on the Louisville & Nashville Railroad at 6 A.M., Wednesday, March 10, 1965. The organization advised this withdrawal was due to the failure of the carrier to bargain concerning the employees notice of September 14, 1964 relative to suitable lodging.

The Board, on March 9, 1965, assigned NMB Case No. E-291 to this dispute and requested the organization to defer proposed strike action. The organization complied with this request. On March

31, 1965 the Brotherhood of Railroad Trainmen requested that they be made a party to this case on the basis of notices involving the question of suitable lodging served as follows: September 18, 1964 (L&N) and September 28, 1964 (NYC&STL). On the basis of this request all parties were advised that the BRT would be made a party to NMB Case No. E-291. Mediator J. Earl Newlin was assigned to this case and commenced handling in Louisville March 18, 1965.

The Board has now had an opportunity to review this file and the notices of September 14, 1965 served by the ORC&B and the notices of September 18 and 28, 1964 served by the BRT. On the basis of this review the Board has reached the conclusion that these are proper notices served in accordance with Section 6 of the Railway Labor Act. Therefore, you are advised NMB Case No. E-291 has been converted and docketed as NMB Case No. A-7397, and will be handled accordingly.

Very truly yours,

THOMAS A. TRACY
Executive Secretary

4-ctm

cc-to: J. E. Newlin

APPENDIX H

Agreement made this 6th day of July, 1965, by and between the Louisville and Nashville Railroad Company and its Trainmen on the L&N District, represented by the Brotherhood of Railroad Trainmen.

PREAMBLE:

The Louisville and Nashville Railroad Company and its Trainmen are parties to the National Agreement of June 25, 1964, Article II of which reads as follows:

“ARTICLE II—EXPENSES AWAY FROM HOME

“Section 1 —

“When the carrier ties up a road service crew (except short turnaround passenger crews), or individual members thereof, at a terminal (including tie-up points named by assignment bulletins, or presently listed in schedule agreements, or observed by practice, as regular points for tying up crews) other than the designated home terminal of the crew assignment for four (4) hours or more, each member of the crew so tied up shall be provided suitable lodging at the carrier's expense or an equitable allowance in lieu thereof. Suitable lodging or an equitable allowance in lieu thereof shall be worked out on a local basis. The equitable allowance shall be provided only if it is not reasonably possible to provide lodging.

“If an allowance is being made in lieu of lodging as well as other considerations under

provisions of existing agreements, the amount attributed only to lodging shall be removed if suitable lodging is supplied, or offset against an equivalent allowance. This shall be worked out on a local basis.

"The provisions of this Section shall be made effective at a date no later than 30 days following the effective date of this Agreement.

"Section 2 —

"When the carrier ties up a road service crew (except short turnaround passenger crews), or individual members thereof, at a terminal (as defined in Section 1 of this Article II) other than the designated home terminal for four (4) hours or more, each member of the crew so tied up shall receive a meal allowance of \$1.50.

"NOTE: For the purpose of Sections 1 and 2 of this Article II, extra board employees shall be provided with lodgings and meal allowance in accordance with the rule governing the granting of such allowance to the crew they join; that is, the designated home terminal will be the designated terminal of the crew assignment."

IT IS AGREED:

1. Suitable lodging for trainmen qualified therefor under Article II, Section 1, of the National Agreement of June 25, 1964, will be provided at points and establishments mutually satisfactory to the Director of Personnel of the carrier and the Gen-

eral Chairman of the Brotherhood of Railroad Trainmen, at the carrier's expense.

2. The term "suitable lodging" is defined to mean sanitary rooms, one man to a room. Each room shall be equipped with a comfortable bed. Bathing facilities, with hot and cold running water, and toilet will be readily available to the occupants of these rooms on the same floor. Blankets and clean linen (sheets and pillow cases) and soap and towels will be supplied for each occupant. Periods of occupancy, during layover periods while available for call, will not be limited. Rooms will be cleaned and bed linen changed after each occupancy by personnel other than trainmen. Rooms shall be cooled or heated when climatic conditions normally require such cooling or heating.

3. If a lodging facility provided in accordance with Section 1 hereof becomes unsatisfactory to either party to this agreement and correction is not feasible, designation of the facility will be cancelled and the parties will proceed again in accordance with Section 1 hereof.

4. The parties will proceed promptly to fulfill their obligations under the foregoing provisions of this agreement. In the event a road service trainman (except short turnaround passenger trainman) is tied up four (4) hours or more at a terminal or tie-up point described in Article II of the National Agreement of June 25, 1964, at which it has not been reasonably possible to provide suitable lodging, an equitable allowance in lieu of lodging, in the amount of \$2.00, will be allowed for each such tie-up. However, if the trainman is tied up for more than 24 hours an additional allowance of \$2.00 will be made.

5. If a trainman is tied up four (4) hours or more at a terminal or tie-up point as described in Article II of the National Agreement of June 25, 1964, but the designated facility at which suitable lodging has been provided in accordance with Section 1 hereof has no room available and arrangements have not been made elsewhere for overflow, the trainman, if qualified to receive suitable lodging, will be allowed an equitable allowance of \$2.00 or actual lodging expense, whichever is the greater. Claim for the actual lodging expense will be supported by receipt.

6. A trainman in interdivisional service, the designated home terminal of which is off of his seniority district, but who lives at or in the vicinity of the away-from-home terminal of his assignment, will be allowed \$2.00 in lieu of lodging for each tie-up of four (4) hours or more at the away-from-home terminal of his assignment.

7. In cases where lodging facilities are not provided, trainmen in work train and wrecker service tied up on line of road or at terminals other than the division home terminal for four (4) hours or more and thainmen tied up on line of road under the Hours of Service Law for four (4) hours or more will be paid a monetary allowance of \$2.00 in lieu of lodging for each such tie-up, provided, however, if the trainman is tied up for more than twenty-four (24) hours, an additional \$2.00 allowance will be made. They will not be tied up between their terminals except at points where food and lodging can be procured.

8. If a trainman is called for duty prior to having been tied up for four (4) hours or more and for

any reason the train does not depart until more than one hour after the on-duty time, the four hours will be computed to extend to 30 minutes prior to actual departure time from the terminal.

EXAMPLE 1: A trainman tied up at 4:00 p.m. He is called on duty at 7:45 p.m. The train does not depart until 9:15 p.m. The trainman would be considered tied up from 4:00 p.m. to 8:45 p.m. and would be allowed a meal allowance and also the equitable allowance in lieu of lodging, but in no event will he be entitled to both lodging and the lodging allowance.

EXAMPLE 2. The trainman in the foregoing example departs at 8:45 p.m. He would not be entitled to meal allowance nor allowance in lieu of lodging.

9. Where lodging is provided or an equitable allowance in lieu of lodging is paid in accordance with their agreement, trainmen will not use cabooses as places of lodging. Exception: Trainmen tied up on line of road as referred to in Section 7 of this agreement may use the caboose as a lodging place if other lodging is not provided by the company.

10. Paragraph 3 of Article 29 of the L&N District Trainmen's schedule agreement is revised to read:

“Where cabooses are not pooled, they will be placed on caboose track or other track convenient to supplies before the assigned crew re-

ports for duty and they will be left there until the assigned crew has had an opportunity to obtain supplies, and such cabooses will not be switched with at terminals nor will trains be built on such cabooses."

11. In the event the carrier constructs and operates or arranges for the construction and/or operation of lodging facilities in accordance with specifications hereunder set forth at one or more points on its system for the accommodation of train and engine service employees qualifying for lodging under the provisions of Article II, Section 1, of the National Agreement of June 25, 1964, the foregoing provisions of this agreement relating to the furnishing of suitable lodging or an equitable allowance in lieu thereof shall cease to apply at such point or points when such facilities are placed in service.

SPECIFICATIONS

1. Single occupancy rooms.
2. Adequate lighting and ventilation, including a window in each sleeping room.
3. Controlled heat in winter and air-conditioning in summer.
4. Easy access to toilet and bath facilities on the same floor.
5. Towels, soap and toilet tissue furnished.
6. Cooled drinking water.
7. Hot and cold water.
8. Twin-size bed with box springs, mattress and blankets.
9. Linen changed after each occupancy.

10. Room dimensions to be not less than 8 ft. by 9 ft. by 8 ft. high.
11. Room to be equipped with comfortable chair, night stand and clothes rack.
12. Lounge, including comfortable chairs, writing tables and lamps.
13. Surface of floor to be other than concrete.
14. Adequate kitchen facilities where restaurant is not located within one-half mile of lodging.
15. Facilities will be maintained in a clean and sanitary condition by other than trainmen, except trainmen using kitchen facilities will restore them to the condition in which they found them.

12. In instances where the distance from the off-duty point to the lodging facility provided by the carrier in accordance with the terms of this agreement, or from such lodging facility to the on-duty point, is one mile or more, the carrier will provide transportation without cost to the trainmen. Except as provided hereinafter, such transportation will be in automotive passenger vehicles and will be made available within 30 minutes after time of relief from duty. When it becomes known that the vehicle normally used for transportation will not be available within the specified 30 minutes, the carrier's representative will arrange for taxi service provided the taxi can be made available before the vehicle normally used. In instances where the distance from the off-duty point to the nearest public bus line stop, or from the nearest public bus line stop to the on-duty point, as the case may be, is not more than

one-fourth mile and the distance between the lodging facility and the nearest public bus line stop is not more than one-fourth mile, trainmen entitled to transportation at the company's expense will, when directed by the carrier, use public bus transportation during such hours as the public bus schedules are not more than 30 minutes apart, and in that event they will pay the bus fare and it will be reimbursed to them by the carrier. Such bus service will constitute satisfactory transportation under this Section. The distances referred to in this Section are to be computed via the route a pedestrian would normally travel.

13. Add a paragraph to Article 6 of the L&N District Trainmen's Schedule Agreement reading:

"The time of trainmen in freight service will be computed to the time the last member of the train crew is relieved from duty, regardless whether the crew member last relieved is the conductor, flagman or brakeman. (Such time will also be used in computing final terminal delay, if any accrues, which will, of course, be computed on the basis of the actual mileage paid, beginning at designated governing point.)"

14. This agreement is in full and final settlement of the dispute concerning the meaning and application of Section 1 of Article II of the National Agreement of June 25, 1964, and growing out of the trainmen's notice of September 18, 1964, on the subject of suitable lodging.

15. This agreement shall become effective August 1, 1965, and shall continue in effect until changed or modified in accordance with the provis-

ions of Section 6 of the Railway Labor Act, as amended.

Signed at Louisville, Kentucky, this 6th day of July, 1965.

FOR THE EMPLOYEES CONCERNED:

/s/ J. M. HICKS
General Chairman, B.R.T.
L&N District

APPROVED:

/s/ I. M. KING
Vice President, B.R.T.

FOR THE LOUISVILLE AND NASHVILLE
RAILROAD COMPANY:

/s/ W. S. SCHOLL
Director of Personnel

No. 20331

United States
COURT OF APPEALS
for the Ninth Circuit

ORDER OF RAILWAY CONDUCTORS AND
BRAKEMEN, a voluntary unincorporated association,
T. M. DELANEY, individually and as General
Chairman, LEO HOLZACHUH, EARL A. JONES,
E. O. BUDAHL, and M. H. MEISTRELL, individually
and as Local Chairmen,

Appellants,

v.

SPOKANE, PORTLAND & SEATTLE RAILWAY
COMPANY, a Washington corporation,
OREGON TRUNK RAILWAY, a Washington
Corporation, and OREGON ELECTRIC RAILWAY
COMPANY, an Oregon corporation,

Appellees.

**REPLY BRIEF FOR APPELLANTS' ORDER OF RAILWAY
CONDUCTORS AND BRAKEMEN, ET AL.**

*Appeal from the United States District Court
for the District of Oregon*

CLIFFORD D. O'BRIEN
514 Corbett Building, Portland, Oregon 97204
HARRY J. WILMARTH
Merchants National Bank Building
Cedar Rapids, Iowa
Attorneys for Appellants.

FILED

DEC 3 1965

FRANK H. SCHMID, CLERK

SUBJECT MATTER INDEX

	Page
Introductory Statement	1
I. The White House National Work Rules Agreement did not bind the parties for a term as to any issue except rates for miles in excess of the basic day	3
II. The White House National Work Rules Agreement did not provide for compulsory arbitration of the contractual provisions to be entered into on a local basis between an individual carrier and a union with respect to the provision to be made for employees' expenses away from home	5
III. The parties are free to strike to secure a contractual provision establishing conditions of employment or compensation whenever the National Mediation Board is not engaged in mediation of the dispute and ten days have elapsed since the termination of conferences	8
Conclusion	9
Certificate of Counsel	10

TABLE OF AUTHORITIES

CASES CITED

Order of Railway Conductors and Brakemen v. Louisville & Nashville R. Co. (5th Cir. 1964), 331 F.2d 368	4
---------------------------------------------------------------------------------------------------------------	---

STATUTES CITED

Railway Labor Act:	
45 U.S.C. 153	6
45 U.S.C. 156	8, 9
Senate Joint Resolution 102, 77 Stat. 132	4

United States
COURT OF APPEALS
for the Ninth Circuit

ORDER OF RAILWAY CONDUCTORS
AND BRAKEMEN, et al.,

Appellants,

v.

SPOKANE, PORTLAND & SEATTLE
RAILWAY CO., et al.,

Appellees.

*On Appeal from the United States District Court
for the District of Oregon*

**REPLY BRIEF FOR APPELLANTS' ORDER OF RAILWAY
CONDUCTORS AND BRAKEMEN, ET AL.**

The court below granted the preliminary injunction on one ground only, namely, that the dispute involved in the strike was a serious dispute which is properly referable to an adjustment board (R. 115). Appellees in their brief do not meet this issue as analyzed in appellants' brief. They ignore the obvious fact that appellants were trying to get an agreement creating as to the fu-

ture the right to an air conditioned room, a new Simmons 400 mattress, and calls to wake the away from home employee, which was an entirely different dispute from the question appellees attempted to submit to the adjustment boards, namely, whether the list of facilities contained in the carriers' July 25, 1964 notice complied with past contractual obligations to furnish suitable accommodations. Instead of facing this issue, appellees raise new issues, trying to make it appear that appellants' August 3, 1964 notice was barred by some moratorium or no strike agreement (Appellees' Br., pp. 28-29), or by some agreement to arbitrate the issue of the contractual provision to be made for expenses away from home (Appellees' Br., p. 24), or that mediation procedures had not been exhausted (Appellees' Br., pp. 14, 22-23, 26-27, 29-30), or that the strike threatened would violate the status quo agreement of September 15, 1964 (Appellees' Br. p. 8).

The complaint sought an injunction on only one ground, that the threatened strike was over a minor dispute (R. 10). The court below granted the injunction on this basis only. The new issues are not properly before this Court. They were not raised below nor was any cross appeal taken by appellees. Upon the record now before this Court the injunction issued below cannot properly be affirmed on any of the suggested bases.

The White House National Work Rules Agreement did not bind the parties for a term as to any issue except rates for miles in excess of the basic day.

Appellees in their brief attempt to bring the issue of expenses away from home into some assumed no strike provision allegedly applicable to the national settlement of the notices of November 1959 and September 1960. Appellees repeatedly state that the issue of expenses away from home was handled by each side on a national basis beginning with the original 1959 and 1960 notices and continuing down through the White House Agreement of June 25, 1964 (Appellees' Br., pp. 3-4, 28-29). Appellees conclude that "it is unthinkable that this dispute, which is an integral part of the national handling of all disputes in a non-strike basis, could suddenly become a strikable issue." (Appellees' Br., p. 29).

This conclusion of appellees is without any foundation in fact or in law. The White House National Work Rules Agreement of June 25, 1964, expressly left all parties free, except as to rates for miles in excess of the basic day, to propose changes therein immediately and to strike to bring about such changes once the usual procedures of the Railway Labor Act for changing or modifying agreements had been followed. Thus Article VIII "Effect of This Agreement" (Plffs' Exh. 6) twice expressly provides that the agreement, except as to rates for miles in excess of the basic day, is to remain in effect only until changed or modified in accordance with the provisions of the Railway Labor Act. In other words,

the agreement was not for any specified term. The parties could the next day after signing it give notice of the desire to negotiate a change.

One other carrier unsuccessfully tried to convince the courts that somehow any issue involved in the national handling which resulted in S. Joint Resolution 102, 77 Stat. 132, and the White House Settlement somehow ceased to be the proper subject for a Section 6 notice enforced by strikes. *Order of Railway Conductors and Brakemen v. Louisville & Nashville R. Co.* (5 Cir. 1964), 331 F.2d 368, 369-370. The United States Court of Appeals for the Fifth Circuit, in refusing to enjoin a strike, very properly pointed out that S. Joint Resolution 102, 77 Stat. 132, expired February 28, 1964 and hence its no strike provisions, if applicable, would have no force and effect after that date, except as to matters included in the Arbitration Award of Board No. 282. Here, of course, there is no contention that expenses away from home were included in the issues submitted to Board 282 or within its award.

From the foregoing it is evident that neither by agreement nor by law, is there any moratorium or no strike provision applicable to prevent appellants from striking to secure as accommodations for employees when away from home a new Simmons 400 mattress and calls to wake them, or \$6.00 allowance per trip in lieu thereof.

II

The White House National Work Rules Agreement did not provide for compulsory arbitration of the contractual provisions to be entered into on a local basis between an individual carrier and a union with respect to the provision to be made for employees' expenses away from home.

The appellees take the view that the White House National Work Rules Settlement bound each individual carrier and each union to arbitrate what contractual provisions should be made for expenses away from home, in the event they could not reach an agreement with respect thereto. Appellees state (Br. p. 24):

“If agreement could not be reached, the ‘White House’ solution itself provided for the arbitral process as its substitute—”

The trial court made no such finding and we respectfully submit that there is nothing in the White House National Work Rules Agreement which supports such a construction. Article II of the White House National Work Rules Agreement (Plffs’. Exh. 6) provides with respect to “Expenses Away from Home,” in Section 1 thereof, that:

“Suitable lodging or an equitable allowance in lieu thereof shall be worked out on a local basis.”

Counsel for appellee in his opening statement in the court below properly recognized that the quoted sentence contemplated that each carrier would negotiate on a local basis a contractual obligation specifying the

lodging to be furnished or the dollars and cents to be paid instead. Counsel for appellees stated (Tr. 8):

“Obviously, when any matter of that kind is being settled on a national basis, it isn’t possible to dictate what is going to be suitable lodging or an equitable allowance in lieu thereof. So the agreement entered into at the White House’s compulsion also provided that this—what was suitable lodging or an equitable allowance in lieu thereof should go back to the various carriers and the organizations for negotiation.”

Nowhere in the agreement is there any provision for determining by the “arbitral process” (Appellees’ Br. p. 24) what the contractual obligations of any carrier or any union shall be with respect to the specific type of lodgings to be furnished or the dollars and cents to be paid as an allowance in lieu thereof. Nor is there any evidence that arbitration of this issue was ever contemplated.

Appellees’ attempt to create an obligation to arbitrate the contractual provision to govern expenses away from home out of the statement in Article VII that “Any disputes involving the interpretation or application of this Agreement shall be settled by the parties in accordance with the established procedures therefor, including the creation of Special Boards of Adjustment and other procedures of Section 3 of the Railway Labor Act.” (Plffs’ Exh. 6). This provision adds nothing. Without this provision, by reason of Section 3 of the Railway Labor Act, 45th S.C.A. 153, all disputes involving the interpretation or application of any collective bargaining

agreement entered into by railway carriers with unions are referable to adjustment boards. There is nothing in this provision which even suggests that its scope is broader than the usual grievance jurisdiction traditionally handled by adjustment boards in the railroad industry. Nothing in this provision suggests that the parties were agreeing to arbitrate the making of new contractual obligations looking to the future.

Both in the railroad field and in the non railway field the distinction between the resolution of grievances and the negotiation of new contractual terms is well established. Arbitration is the generally approved method of resolving grievances but it is so rarely used for the creation of new contract terms as to negative the validity of any assumption arbitration of new contractual terms was intended. From appellees' presentation the Court is invited to infer that the adjustment board provision in the contract has reference to the expenses away from home provision. An examination of the whole contract negatives such an inference. Article VII, referring to board of adjustment procedure, was obviously drafted for the purpose of providing adjustment board procedures to deal with questions arising under the literally hundreds of other contractual obligations contained in the same contract. Thus the White House National Work Rules Agreement contains pages of detailed provisions with respect to the manner in which employees are to receive pay for holidays, the manning of self-propelled machines, the pay structure for road and yard service and the use of combination road-yard service. There is no basis for inferring that adjustment board

provisions in the contract were put there as a method of arbitrating the expenses away from home questions.

Article VII, providing for adjustment board resolution of issues of interpretation and application, would apply to Article II only if there were some issue of interpretation or application of the contractual terms already adopted by the parties. It is not a provision for the resolution by arbitration of the contractual provisions to be adopted by the parties. The agreement by providing for working out on a local basis recognizes that contractual provisions must be worked out by the parties to define the extent of the obligation in terms of specific accommodations and specific sums to be paid in lieu.

III

The parties are free to strike to secure a contractual provision establishing conditions of employment or compensation whenever the National Mediation Board is not engaged in mediation of the dispute and ten days have elapsed since the termination of conferences.

Section 6 of the Railway Labor Act, 45 U.S.C.A. 156, quoted in full at page 22 of our main brief, limits the right to strike only for the periods in which negotiation or mediation is taking place, and ten days thereafter. Here more than ten days had elapsed since the last conferences. The National Mediation Board neither proffered its services nor were the Board's services requested by the carrier.

It is true that the mediatory services of the National

Mediation Board were requested by the union. The Mediation Board failed to docket the case and at no time mediated the dispute (Tr. 13). The inaction of the National Mediation Board cannot serve to deprive the union of its right to strike in support of its contract proposals. The union had done everything within its power to comply with all the provisions of the Railway Labor Act.

If the unions had never requested the National Mediation Board to mediate, the union would be free to strike just as the carrier is free under the provisions of Section 6 to alter its rates of pay, rules, or working conditions when a "period of ten days has elapsed after termination of conferences without a request for or a proffer of the services of the Mediation Board." Where the Mediation Board fails to provide its mediation services, a party should be no worse off for having requested such services than he would have been had he not requested the services.

CONCLUSION

We believe all the other contentions raised by the appellees in their brief, to the extent they are properly before this Court, are fully answered by what we have already stated in our main brief and do not merit further reply.

The court below decided the case upon the sole issue that a minor dispute only was involved. But the documentary evidence establishes that the appellants sought to strike to secure a contractual provision specifying

the facilities be provided employees away from home for the future. This was clearly a major dispute and hence appellants were entitled to exercise their self help powers including the right to strike without being enjoined therefrom by the courts.

Respectfully submitted,

CLIFFORD D. O'BRIEN
514 Corbett Building,
Portland, Oregon 97204

HARRY J. WILMARTH
Merchants National Bank Building
Cedar Rapids, Iowa

Attorneys for Appellants

Portland, Oregon
December 1, 1965

CERTIFICATE OF COUNSEL

I, Clifford D. O'Brien, one of the attorneys for Appellants, hereby certify that in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

CLIFFORD D. O'BRIEN

No. 20331

United States
COURT OF APPEALS
for the Ninth Circuit

ORDER OF RAILWAY CONDUCTORS AND
BRAKEMEN, a voluntary unincorporated association,
T. M. DELANEY, individually and as General
Chairman, LEO HOLZACHUH, EARL A. JONES,
E. O. BUDAHL, and M. H. MEISTRELL, individually
and as Local Chairmen,

Defendants-Appellants,

v.

SPOKANE, PORTLAND & SEATTLE RAILWAY
COMPANY, a Washington corporation,
OREGON TRUNK RAILWAY, a Washington
Corporation, and OREGON ELECTRIC RAILWAY
COMPANY, an Oregon corporation,

Plaintiffs-Appellees.

*Appeal from the United States District Court
for the District of Oregon*

**BRIEF FOR APPELLEES, SPOKANE, PORTLAND
& SEATTLE RAILWAY COMPANY ET AL.**

HUGH L. BIGGS,
JAMES P. ROGERS,
GARY R. BULLARD,
DAVIES, BIGGS, STRAYER, STOEL AND BOLEY,

1410 Yeon Building,
Portland, Oregon 97204,

Attorneys for Appellees.

FILED
NOV 13 1965
FRANK H. SCHMID, CLERK

SUBJECT INDEX

	Page
Jurisdictional Statement	1
Statement of the Case	2
Argument	10
I. Appellant's failure to comply with the provisions of Rule 18(2) (d) of the Rules of this Court (28 U.S.C.A. 1964, Pocket Part p. 107) by specifying wherein the District Court's findings of fact are alleged to be erroneous limits the examination of those findings by this Court to the issue of whether the findings support the conclusions of law and the temporary injunction granted thereon	10
II. Conclusion of Law Number 2 that "The dispute between plaintiffs and defendant ORC-&B is a minor dispute under the provisions of the Railway Labor Act, as amended (45 U.S.C.A. et seq.) . . ." is inescapable under the uncontested Findings of Fact entered herein	12
A. "Major" and "minor" disputes are clearly defined by the Act and judicial decisions	12
B. This dispute was clearly a minor dispute under the Act	17
C. The dispute being a "minor" one, "self-help" or a strike by appellant is unlawful	26
III. An injunction is clearly warranted in this case	27
Conclusion	30
Certificate	31
Appendix I	33

INDEX OF AUTHORITIES

Page

CASES CITED

American Airlines, Inc. v. Air Line Pilots, 169 F. Supp. 777 (D.C. S.D. N.Y. 1958).....	27, 29
Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co., 353 U.S. 30, 77 S. Ct. 635, 1 L. Ed. 2d 622, 39 L.R.R.M. 2578 (1957).....	17, 26, 28
Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768, 72 S. Ct. 1022, 96 L. Ed. 1283 (1952).....	27, 29
Butte, Anaconda & Pacific R. Co. v. B. of L.F. & E., 268 F.2d 54 (9 Cir. 1959), cert. den., 361 U.S. 864, 80 S. Ct. 124, 4 L. Ed. 2d 104 (1959)	16
C.R.I.&P. Railroad v. Hardin, 239 F. Supp. 1.....	3
Elgin, Joliet & Eastern R. Co. v. Burley, 325 U.S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886, 16 L.R.R.M. 749	16, 17, 24
Greyhound Corp. v. Blakley, 262 F.2d 401 (9th Cir. 1958)	11
Missouri-Illinois R. Co. v. ORC&B, 322 F.2d 793 (CA 8, 1963)	22, 23, 24
Navel v. United States, 278 F.2d 611 (9th Cir. 1960)	11
Pa. R. R. Co. v. Transport Workers, 202 F. Supp. 134 (D.C. E.D. Pa. 1962).....	29
Reynolds v. Lentz, 243 F.2d 589 (9th Cir. 1957).....	11
Thys Company v. Anglo California National Bank, 219 F.2d 131 (9th Cir. 1955)	11
Virginia Ry. Co. v. System Federation No. 40, 300 U.S. 515, 57 S. Ct. 592, 81 L. Ed. 789 (1937).....	27, 29

TABLE OF AUTHORITIES (Cont.)

	Page
STATUTES CITED	
28 U.S.C. 1292(1), (Act of September 2, 1958, P.L. 85-919, 72 Stat. 1770)	1
Railway Labor Act	
45 U.S.C. § 151 et seq.	2, 12
45 U.S.C. § 153, First (i)	12, 14, 25, 26
45 U.S.C. § 153, Second	15
45 U.S.C. § 156	12, 13
Public Law 88-108 (79 Stat. 129, Act of August 28, 1963)	3
28 U.S.C.A. 1964, Pocket Part p. 107 (Rule 18(2) (d)), Ninth Circuit	10, 11
Norris-LaGuardia Act	
29 U.S.C. §§ 101-115, 47 Stat. 70.....	27

United States
COURT OF APPEALS
for the Ninth Circuit

ORDER OF RAILWAY CONDUCTORS AND
BRAKEMEN, a voluntary unincorporated association,
T. M. DELANEY, individually and as General
Chairman, LEO HOLZACHUH, EARL A. JONES,
E. O. BUDAHL, and M. H. MEISTRELL, individually
and as Local Chairmen,

Defendants-Appellants,

v.

SPOKANE, PORTLAND & SEATTLE RAILWAY
COMPANY, a Washington corporation,
OREGON TRUNK RAILWAY, a Washington
Corporation, and OREGON ELECTRIC RAILWAY
COMPANY, an Oregon corporation,

Plaintiffs-Appellees.

*Appeal from the United States District Court
for the District of Oregon*

**BRIEF FOR APPELLEES, SPOKANE, PORTLAND
& SEATTLE RAILWAY COMPANY ET AL.**

JURISDICTIONAL STATEMENT

Insofar as the appellants' brief states that this court has jurisdiction of the appeal on the basis of Section 28 U.S.C. 1292(1) as amended (Act of September 2, 1958, P.L. 85-919, 72 Stat. 1770), appellees concur. The bal-

ance of the jurisdictional statement in that brief seems incongruous to its subject. Subsequent to the issuance of a temporary restraining order against a threatened strike by appellants (R. 116) the court below after hearing entered Findings of Fact and Conclusions of Law and thereupon granted the application of appellees for the temporary injunction from which appellants have taken this appeal.

STATEMENT OF THE CASE

(Though appellants and appellees are both named in the plural, we will hereafter, as have appellants, treat them as one on each side.)

Because appellee is unable to agree with substantial portions of the statements either made in or omitted from appellant's Statement of the Case, we think it desirable to restate the facts, based upon the Findings of Fact entered by the court below. For the court's convenience we reproduce those findings in Appendix I of this brief.

We find no fault with appellant's description of the Order of Railway Conductors and Brakemen as a labor organization or of appellee as a carrier and employer, both subject to the provisions of the Railway Labor Act (45 U.S.C. § 151 et seq.) as amended, hereafter called the "Act."

The court is well aware, and could take judicial notice, of the dispute which arose between virtually all of the nation's major rail carriers, of which appellee was one, and the five "operating brotherhoods," of which

appellant was one, arising out of identical formal notices of proposed rule changes served on the five brotherhoods by the carriers in November of 1959 and on the carriers by the five brotherhoods in September of 1960,¹ pursuant to Section 6 of the Railway Labor Act. The sum of these proposals, particularly those of the carriers, would have completely revised the rules and practices of many decades concerning (1) the manning of engines, (2) the "consist" of train crews behind the engines, and (3) a host of other rules and practices concerning working conditions and rates and bases of compensation.

The disputes these formal notices and counternotices created between the carriers and five brotherhoods were national in scope and from the beginning were handled by each side on a national basis. The first two of the three major categories into which these disputes fell were eventually resolved by the enactment by the Congress of Public Law 88-108 (79 Stat. 129, Act of August 28, 1963) and the resulting award of Board No. 282, relating to the removal of firemen on diesel engines, and procedures for changing the number of men in train crews in freight and yard service.

There remained, however, a myriad of issues still in dispute, known collectively as the "unresolved work rules." These were finally disposed of at the insistence of President Johnson by an agreement generally known as

¹ Cf. pp. 287 et seq., 294 et seq., "Report of the Presidential Railroad Commission" February 1962 (Exhibit 3 offered in evidence at the July 3 hearing and admitted for a limited purpose, Transcript of Proceedings, pp. 77, 78, by stipulation made a part of Transcript on Appeal but in printed, not photocopied, form). For an excellent history of the disputes, see *C.R.I. & P. Railroad v. Hardin*, 239 F. Supp. 1, at pp. 9-13, inclusive.

the "White House Agreement" because its basic outline was agreed to on a national basis at the White House, though the written and more detailed form was actually worked out and signed in Chicago, Illinois.. That agreement is dated June 25, 1964 (R. 104). It is this "White House Agreement"—or rather one part of it—which is involved in this dispute and the temporary injunction this court is asked to review. That part of the White House Agreement with which we are here concerned is known as the "Allowances Away From Home" issue, and on this "property" (appellee's railway system) as on many others in the nation, springs from a long history of practices in freight service in the railway industry.

In the collective bargaining agreement, or "schedule," between appellee and appellant there is (R. 103) an Appendix "E," dated July 14, 1952, relating to the "pooling of cabooses." That agreement, Paragraph (c) (1), (Article 7), reads:

"(1) Whenever the carrier desires so to pool its cabooses, it shall give notice to the General Chairman of such intention, specifying the territory and service involved, whereupon the carrier and employee representatives shall, within 30 days, endeavor to agree upon any facilities that should be furnished to provide accommodations substantially equivalent to those formerly available on the caboose and used by the employees and on appropriate arrangements for supplying and servicing such pooled cabooses."

That agreement, which was part of a national agreement between many carriers, including appellee, and appellant was followed by appellee's decision to "pool cabooses."

So on April 10, 1958, appellee and appellant entered into an agreement that (R. 103):

"4. When trainmen in pool and unassigned freight service are provided with pooled cabooses, their basic rate will be increased one cent (1c) per mile in addition to the established basic through freight rate. This to apply to mileage claimed and paid for as per time slip.

"It is understood that the one cent (1c) per mile applicable to pool and unassigned freight service will also apply to pool and unassigned freight crews when required to perform unassigned way freight, or paid the way freight rate under the Conversion Rule, or when required to perform unassigned work train or unassigned snow service, in addition to the existing rates applicable to such service.

"5. Train crews to whom this agreement is applicable, if tied up between terminals where there are no accommodations to eat or sleep, will be paid continuous time at the pro rata rate while so tied up.

"6. This agreement is without prejudice or precedent to any other practice heretofore recognized and agreed upon by the Carrier and the Organization, but supersedes any conflict arising therefrom."

The background of this subject is too well known in railroad history, particularly in the West, to want explanation here even if the language of these agreements were not self-exploratory. In the earlier days the conductor and crew were often held away from their home terminal for many hours, awaiting return to it. The ca-

boose was their "home away from home," and was known as a part of the conductor's emoluments. But as times changed, and the caboose became part of the train, i.e., "pooled," rather than being cut off with the conductor and crew, the conductor and train crew dependent on the caboose when tied up away from terminal received monetary allowance in lieu of their caboose "home."²

Enlargement of, or change in, the "pooled caboose allowance" was one of the "unresolved work rules" issues involved in the June 25, 1964, "White House Agreement," and is found in Article II, Section 1 of that agreement, which provides:

"ARTICLE II—EXPENSES AWAY FROM HOME:

"Section 1—

"When the carrier ties up a road service crew (except short turnaround passenger crews), or individual members thereof, at a terminal (including tie-up points named by assignment bulletins, or presently listed in schedule agreements, or observed by practice, as regular points for tying up crews) other than the designated home terminal of the crew assignment for four (4) hours or more, each member of the crew so tied up shall be provided suitable lodging at the carrier's expense or an equitable allowance in lieu thereof. *Suitable lodging or an equitable allowance in lieu thereof shall be worked out on a local basis.* The equitable allowance shall be provided only if it is not reasonably possible to provide lodging.

² Cf. Report of the Presidential Railroad Commission pp. 151-153 inclusive.

"If an allowance is being made in lieu of lodging as well as other considerations under provisions of existing agreements, the amount attributed only to lodging shall be removed if suitable lodging is supplied, or offset against an equivalent allowance. This shall be worked out on a local basis.

"The provisions of this Section shall be made effective at a date no later than 30 days following the effective date of this Agreement." (Emphasis supplied.)

Three conferences were held between appellee and appellant's representatives (R. 105) in an attempt to agree on what would be considered "suitable lodging or an equitable allowance in lieu thereof" and the resulting cancellation of the "pooled caboose allowance." These conferences proving unavailing in resolving the issue, and the 30-day period the last paragraph of the above-quoted agreement prescribed being spent, appellee on July 24, 1964, cut the Gordian knot by issuing Circular #65 (R. 105, 106), its version of the application of the White House Agreement on the issue. No termination of negotiations was involved in the Circular. Appellant thereupon, on August 3, 1964, served on appellee its version of what was "suitable lodging or an equitable allowance in lieu thereof" (R. 106, 107).

Thereafter a conference was held between appellant and appellee on the issues created by these conflicting versions of what constituted "suitable lodging or an equitable allowance in lieu thereof," and the pooled caboose allowance cancellation, and on September 15, 1964, they reached and signed a letter agreement (R.

110) which restored the *status quo* as of July 24, 1964, the day before the Circular became effective, and the strike threat hereafter referred to (p. 20 of this brief) was withdrawn. (Since this agreement was signed by N. S. Westergard, Vice President and General Manager, appellee is somewhat puzzled by appellant's statement on page 15 of its brief that this dispute was not handled up to and including the "Chief Operating Officer.")

On January 27, 1965, still another conference was held between appellant and appellee in an attempt to resolve their differences over the pooled caboose allowance and the substitution of suitable lodging or an equitable allowance in lieu thereof in its place. (Agreement on suitable lodging or an equitable allowance in lieu thereof had been reached between appellee and the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen two months earlier (R. 113).) That effort proved unavailing and the letter agreement of September 15, 1964, is still by its terms in effect, so remaining until the parties "* * * mutually agree otherwise * * *."

Apparently seeking consistency with the portion of its letter of August 3, 1964 (R. 106), that appellant conceived its version of suitable lodging or an equitable allowance in lieu thereof to be a "Section 6" notice under the Act, appellant sought to invoke the mediatory procedures of the National Mediation Board (R. 108), and that Board requested a statement from appellee as to its position. On the following day appellee wrote the Secretary of that Board stating its position (R. 108, 109) that the dispute was one over the application of

Article II, Section 1, of the White House Agreement of June 25, 1964, a position consistent with that stated in writing to appellant by appellee in a letter dated August 3, 1964 (R. 107, 108). Again, on November 12, 1964, appellant sought the services of the National Mediation Board (R. 110), and in response to that body's request for its position appellee again stated to its Secretary that the pending dispute was over the application of Article II, Section 1—Expenses Away From Home—of the June 25, 1964, White House Agreement and that therefore the Mediation Board had no place in it (R. 111, 112). The National Mediation Board has not interjected itself into this dispute at any time.

Nothing further was heard from appellant after the January 27, 1965, conference between the parties, nor from the Mediation Board after its telegram of November 12, 1964 (respectively R. 113, R. 110), until the National Mediation Board's telegram to appellee dated June 2, 1965 (R. 113), advising appellee of the appellant's intent to "withdraw from service" on June 7, 1965, which led up to the initiation of the proceeding below. The strike notice has never been withdrawn and is therefore still in effect (R. 114, 115).

Immediately upon being advised of the appellant's threat to "withdraw from service"—strike—on June 7, 1965, appellee submitted the dispute to Special Board of Adjustment No. 434, which had previously been established by the parties pursuant to Section 3, Second, of the Act (R. 45-47). Subsequently, on July 3, 1965, the dispute was likewise submitted to the National Railroad Adjustment Board, First Division (R. 114).

At the time of the entry of the temporary injunction here appealed from and at all times since, the dispute has therefore been before both Special Board of Adjustment No. 434 and the National Railroad Adjustment Board, First Division, for determination by one or the other as provided for in Section 3 of the Act.

ARGUMENT

I

Appellant's failure to comply with the provisions of Rule 18(2)(d) of the Rules of this Court (28 U.S.C.A. 1964, Pocket Part p. 107) by specifying wherein the District Court's findings of fact are alleged to be erroneous limits the examination of those findings by this Court to the issue of whether the findings support the conclusions of law and the temporary injunction granted thereon.

Appellant has not set forth anywhere in its brief the Findings of Fact and Conclusions of Law of the court below. It has mentioned (Appellant's brief p. 6) that "extensive" findings were made and in its eighth specification of error makes a page reference to the Transcript of Record which on examination proves to be the last of two sentences in Finding of Fact Number IV (R. 102, 103) but then argues its own legal conclusion of the meaning of the June 25, 1964, agreement. Appellant did not at any time object to the entry of any of the Findings made by the court below or proffer its version of what the District Court should have found

in the light of the admitted pleadings and the exhibits offered by both sides.

Appellant's brief is actually an attempt to retry *de novo* in this Court the case heard and decided by the District Court. It is just such attempts as this which are, we believe, intended to be precluded by Rule 18(2)(d) which in the part here involved reads that

"* * * In all cases, when findings are specified as error, the specification shall state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous. * * *."

This Court has consistently held that errors which are not specified in accordance with the provisions of Rule 18 need not be considered on appeal. *Navel v. United States*, 278 F.2d 611 (9th Cir. 1960); *Greyhound Corp. v. Blakley*, 262 F.2d 401 (9th Cir. 1958); *Thys Company v. Anglo California National Bank*, 219 F.2d 131 (9th Cir. 1955). In *Reynolds v. Lentz*, 243 F.2d 589 (9th Cir. 1957), this Court stated that it is not required to consider whether findings of fact are erroneous when the appellant's brief contains no specification of error in those findings as required by Rule 18.

Accordingly, the sole issue before this Court on this appeal is whether the Findings of Fact entered below support the District Court's Conclusions of Law, and thereby the temporary injunction which followed. Since the District Court's Findings of Fact unquestionably do support its Conclusions of Law and therefore the temporary injunction, the action of the lower court should be affirmed.

II

Conclusion of Law Number 2 that "The dispute between plaintiffs and defendant ORC&B is a minor dispute under the provisions of the Railway Labor Act, as amended (45 U.S.C. Section 151 et seq.) . . ." is inescapable under the uncontested Findings of Fact entered herein.

A. "Major" and "minor" disputes are clearly defined by the Act and judicial decisions.

The only question for decision below was whether appellee's letter "notice" of August 3, 1964 (R. 106, 107) was a notice of

“. . . an intended *change* in agreement(s) affecting rates of pay, rules, or working conditions, . . .” (Emphasis supplied.)

under Section 6 of the Railway Labor Act as amended (45 U.S.C. § 156), in which event the dispute created was a “major dispute,” or whether that letter involved

“. . . the *interpretation or application* of agreement(s) concerning rates of pay, rules or working conditions, . . .” (Emphasis supplied.)

under Section 3, First (i), of the Act (45 U.S.C. § 153(i)), in which event the dispute created was a “minor dispute.”

It would be difficult if not impossible to improve on the lower court's statement of the answer to the question. After reading from that letter's introduction, he said (Tr. 29, 30),³

³ In this brief the photocopied Transcript of Record is referred to as “R”, the Transcript of Proceedings below as “Tr.”, and the report of the Presidential Railroad Commission hereafter as “Rept.”

"Now, I am not going to read the balance of it. I am just going to conclude that in no place in that letter is there a demand or a request of the plaintiff to change a single word or character of punctuation in the agreement of April 25,⁴ 1964. All that letter purports to do is to ask the plaintiff to subscribe to an interpretation of the provisions of Article 2.

"You have stated your position as to what shall constitute suitable lodging. You haven't asked for a change of the language of the contract. So without belaboring it any further, I think that this dispute as it appears from the record before this Court is nothing more or less than an interpretation of what shall be suitable lodging, or what shall be an equitable allowance in lieu thereof."

At the risk of illustrating what to this Court is surely the obvious, we advert to the scheme of the Railway Labor Act with respect to the handling of the two types of dispute which can arise under it.

The first, or "major," type of dispute has already been referred to in a partial quotation from Section 6; the entire context of that section on the point is

"Carriers and representatives of the employees shall give at least thirty days' written notice of an *intended change in agreements* affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten

⁴ The "April" before "25, 1964" is either a slip of the trial judge's tongue or an error in the notes of the reporter; the June 25, 1964, White House Agreement was obviously the agreement the trial judge was referring to.

days after the receipt of said notice, . . .” (Emphasis supplied.)

If in conference the parties have not reached agreement on a proposal for a new contract provision or a change in an existing provision, the National Mediation Board may intervene either on its own volition, or the request of either party, or of both parties. It is then the function of that Board, created by and stated in Section 5 of the Act, to seek an agreement between the parties by the process of mediation. If the Mediation Board is unable to achieve this result it may so advise the parties, terminate its mediatory services, and request that they arbitrate the dispute. Absent acceptance of that arbitration request or national emergency circumstances authorizing a national emergency board the federal intervention procedures are over, but the parties are not free to use their economic compulsions until 30 days after the Mediation Board has closed the case. At the end of that thirty days, the union is free to strike (or the employer to lock out).

This is a type of dispute termed a “major dispute” over which, at the end of the conferences and the mediatory efforts of the National Mediation Board, a strike can ensue.

The other, or “minor,” type of dispute is that described in Section 3, First (i), of the Act, reading in its pertinent part as follows:

“The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the *interpretation or application*

of agreements concerning rates of pay, rules, or working conditions, . . . , shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." (Emphasis supplied.)

In addition to the creation of the National Railroad Adjustment Board to arbitrate unresolved disputes over the interpretation or application of existing agreements between the carrier and its employees, Section 3, Second, of the Act authorizes the creation by the parties of special boards of adjustment with those same powers, as follows:

"Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board."

It was this provision under which appellee and appellant acted in creating Special Board of Adjustment No.

434 (Finding of Fact XIII, R. 114) later to be referred to.

The distinctions between major and minor disputes under the Act are almost nowhere better set forth than in the decision of this court in *Butte, Anaconda & Pacific R. Co. v. B. of L.F.&E.*, 268 F.2d 54 (9 Cir. 1959), cert. den., 361 U.S. 864, 80 S. Ct. 124, 4 L. Ed. 2d 104 (1959), where at p. 58 it was said:

“(1) At the outset it is necessary to note the distinction between so-called major and minor disputes under the Railway Labor Act. In *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. 711, 723, 65 S. Ct. 1282, 1290, 89 L. Ed. 1886, 16 LRRM 749, the difference between these two kinds of disputes was explained as follows:

“ ‘The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. *They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.*

“ ‘The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement. * * *

“As to both kinds of dispute, the act requires that the parties enter into negotiation as the first step towards settlement of the controversy. Where negotiation fails, the procedures diverge. Major disputes go first to mediation before the National Mediation Board; if that fails, then to acceptance or rejection of arbitration; and finally to possible presidential intervention. If all this fails, compulsory processes are at an end, and either party may resort to self-help. *Elgin, Joliet & Eastern Railway Co. v. Burley*, supra, 325 U. S. at pages 725, 65 S. Ct. at page 1290, 16 LRRM 749. The Norris-LaGuardia Act prohibits the issuance of an injunction in a railway labor case involving a ‘major dispute.’ *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S. 30, 42, 77 S. Ct. 635, 1 L. Ed. 2d 622, 39 LRRM 2578.

“In the case of minor disputes, if negotiation fails either party may submit the matter to the appropriate division of the National Railroad Adjustment Board. The awards of the several divisions of the Adjustment Board are final and binding. *Neither party is permitted to resort to self-help. A strike involving a so-called minor dispute is therefore to be enjoined.* *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, supra.” (Emphasis supplied.)

B. This dispute was clearly a minor dispute under the Act.

Tested by any criteria set forth in the cases this dispute was, as the lower court stated, an unsettled “minor dispute” referable either to the National Railroad Adjustment Board or a special board of adjustment for binding decision as provided in Section 3.

The agreement to be applied, and over which the dispute arose, is Article II, Section 1, of the June 25, 1964, "White House Agreement" quoted at page 6 of this brief (R. 104). The history of this⁵ and other provisions of the "work rules disputes" makes it clear that this agreement was arrived at on behalf of appellant's and appellee's designated agents as part of the entire national settlement of the national train consist and work rules disputes of 1959-60.

While both appellant and appellee were bound by the June 25, 1964, White House Agreement on "allowances away from home" and other "unresolved work rules" issues by the carriers' and brotherhoods' national representatives as firmly as if they had negotiated and executed the settlement locally—"on the property"—the fact is that as to each carrier and operating brotherhood it was a settlement as to all, but on a national basis.

On the issue of "suitable lodging away from home" or "an equitable allowance in lieu thereof" and what then happened to a pooled caboose allowance, the agreement of June 25, 1964, recognized that after its guidelines were set, details would still need to be worked out "on a local basis." Obviously, what is "suitable lodging" or an "equitable allowance in lieu thereof" will be one thing as to crews held away from home terminal in New York City, Miami, Florida, or San Francisco, California, and another thing in Keokuk, Iowa, Pasco, Washington, or Astoria, Oregon.

⁵ Cf. Rept., pp. 13-18, inclusive.

So the agreement, binding on both appellant and appellee, left it to them to work out how it was to be locally applied. And, as the court below correctly determined, this entire dispute involved only that issue. The agreement's deadline of 30 days after its effective date being upon it (July 25, 1964) and no local agreement having been reached, appellee on July 24, 1964, issued its Circular setting forth its concept of "suitable lodging" or an "equitable allowance in lieu thereof," and cutting off previous pooled caboose allowances as the agreement prescribed.

Not only were further negotiations on these issues not foreclosed by the issuance of the Circular, but the conduct of the parties establishes the fact. Two subsequent conferences were held between appellant and appellee, one on September 15, 1964 (R. 110), the last on January 27, 1965 (R. 113), in an attempt to reach final agreement on the application, on the appellee's property, of the June 25, 1964, agreement. Neither conference was successful, and the strike threat ultimately followed (R. 113, 114).

Appellant in its brief attempts, in its hope of trying the case *de novo* here and unlike any contention made below, to argue that the agreement of June 25, 1964, Article II, Section 1, was one thing, but that its "notice letter" of August 3, 1964, was unrelated to it and sought to promulgate a new and different rule. The court below correctly disposed of such an argument in his remarks quoted at page 13 of this brief. That he was correct is proved by the actions of appellant in its agreement of September 15, 1964, for that agreement spe-

cifically refers to the White House Agreement in this language (R. 110):

“We hereby agree to the following in connection with *our dispute as to the interpretation of Section 1, Article II of the National Agreement dated June 25, 1964:*” (Emphasis supplied.)

Though that “interim” agreement is set forth in the Findings of Fact (R. 110), it is worthy of reproduction here:

“Mr. T. M. Delaney, General Chairman,
Order of Railway Conductors and Brakemen,
Vancouver, Washington

“Dear Mr. Delaney:

“We hereby agree to the following in connection with our dispute as to the interpretation of Section 1, Article II of the National Agreement dated June 25, 1964:

“Until we mutually agree otherwise, the status quo as of June 24, 1964, will be preserved with respect to those trainmen who are covered by the so called pooled caboose agreement dated April 10, 1958.

“The strike of employees whom you represent which has been scheduled for 7:00 AM, Wednesday, September 16, 1964, is hereby cancelled.

“Yours truly,

/s/ N. S. WESTERGARD
Vice President and
General Manager

“Agreed to:

/s/ T. M. DELANEY
General Chairman
Order of Railway Conductors
and Brakemen.”

Much of what preceded, or followed, these facts as found by the court below are of relatively little consequence in the decision of the lower court or its affirmance here. For example, the National Mediation Board twice advised appellee (R. 108, 110) that it had been advised by appellant of the existence of a dispute in which its services were invoked; on both occasions it was advised in return by appellee (R. 108-109, 111-112) that the dispute was not one of NMB cognizance but was a "minor dispute" under the Railway Labor Act and the terms of the "White House Agreement" itself, and if unresolved was subject to the arbitral processes of the National Railroad Adjustment Board or a special board of adjustment under Section 3 of the Act. At no time has the National Mediation Board ever intervened in this dispute, whether by proffer of its services or otherwise. This fact has significance, it seems to appellee. The National Mediation Board is not to be charged, we think, with dereliction in carrying out its duties; rather, it seems clear, it must have agreed with appellee.

It must not be overlooked that Article VII of the White House Agreement of June 25, 1964, of itself provides that (R. 105).

"Any disputes involving the interpretation or application of this agreement shall be settled by the parties in accordance with the established procedures therefor, including the creation of Special Boards of Adjustment and other procedures of Section 3 of the Railway Labor Act."

It may be questionable whether this language in

that agreement was necessary since the application of the provisions of the agreement, particularly in connections with the "Allowances Away From Home" disputes which might arise, would of necessity be resolved, if agreement of the parties proved impossible, by the procedures of Section 3 of the Act. However, lest there be doubt, that agreement itself provided the solution for these disputes. That is precisely what appellee did. To say that there is some deficiency in following the precise instructions of the agreement which produced this dispute in effecting its peaceful solution is not under standable.

Appellant has cited *Missouri-Illinois R. Co. v. ORC&B*, 322 F.2d 793 (CA 8, 1963).

The relevance of this citation is not apparent.

First, the carrier in that case did what the carrier here did not do, that is, it first impliedly if not expressly considered this a "major" dispute by acquiescing in the entry of the National Mediation Board through to the conclusion of its statutory procedures; not until then did the carrier attempt to make the dispute a "minor" one by submitting it to the arbitral processes of the National Railroad Adjustment Board as provided in Section 3 of the Act (cf. Column 1, 322 F.2d 797).

Here, however, appellee has never deviated from its position that this is a "minor" dispute and that the National Mediation Board for that reason had no part in this dispute (R. 108, 111), and in fact, as found by the court below (R. 113), the NMB has at no time intervened here as the Act would require it to do if this

were a "major" dispute. Unlike that in the *Missouri-Illinois* case, this controversy was not only submitted to the appropriate tribunal (whichever it might be) under Section 3 of the Act, but the NMB never intervened either prior to, or after, the two submissions.

Second, the decision in the *Missouri-Illinois* case was based on an entirely different national agreement than the "White House Agreement" here in issue, both in time and content. The *Missouri-Illinois* case involved a "national agreement" which by its terms allowed the creation of a new rule relating to the establishment of rates of pay for new assignments to be known as "road switchers," apparently not covered by the then existing agreements on the *Missouri-Illinois* property. Thus there was no national agreement to be interpreted on that property, as is the case here, but instead there was a national agreement looking to the creation of a new rule involving rates of pay and assignments on properties where such rates and assignments were nonexistent. This was without question properly the subject of a notice pursuant to Section 6 of the Act.

Rather than being authority *contra* the decision of the trial court here, therefore, the *Missouri-Illinois* case supports the basic principle to which we have adverted. All national agreements are not the same. That one left open the negotiation of a new rule. In *this* case, unlike the *Missouri-Illinois* case, the White House Agreement left to settlement of the parties only the *application and interpretation of an existing* rule (the White House Agreement) on expenses away from home, an equitable allowance in lieu thereof, and the fate of the

previous pooled caboose allowance thereupon. If agreement could not be reached, the "White House" solution itself provided for the arbitral process as its substitute—a far cry from the national agreement in the *Missouri-Illinois* case.

The distinction between the two cases is obvious. As the court there rightly said, a proper Section 6 notice seeks to *create* contractual rights for the future, cf. *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U.S. 711, 723, 65 S. Ct. 1282, 1290, 89 L. Ed. 1886, rather than *enforce present* contractual rights, which was exactly what the national agreement there involved left open to the parties. Here the contractual rights were *created* by the national agreement; their *application or interpretation* (enforcement) was the thing left to the parties, or to arbitration absent their agreement.

At the July 3 hearing in the court below appellant offered in evidence a letter from it to another railroad in another part of the country in some respects similar to its August 3, 1964, "notice letter" to appellant, and a reply from the National Mediation Board. Despite the fact that these letters were rejected in evidence (Tr. 76) they appear in the Appendix to appellant's brief without any notation that they were rejected below (Appellant's brief, pp. 33, 34, 41, 43). Something similar in the way of letter exchanges also appears in the Appendix to that brief (pp. 37, 39), though never proffered in evidence or even mentioned below, where such correspondence would undoubtedly have had the same fate. While this method of extracting comfort from some other carrier's problems seems

unusual indeed, it appears unlikely to be seriously regarded, on this appeal, as having any value, probative or otherwise. What is involved here is *this* dispute between *these* parties on *this* property. The National Mediation Board's view of the status of a dispute between appellant and other labor organizations on other railroads is not relevant to this case.

Lastly, whether this dispute was required to be submitted to the National Railroad Adjustment Board or to Special Board of Adjustment No. 434 has little to do with the lawfulness of a strike by appellant on this issue. There was—and is still—a dispute over the interpretation and application, on this property, of Section 1 of Article II of the agreement of June 25, 1964. Agreement failing, appellee submitted the dispute to Special Board of Adjustment No. 434, as it conceived its duty to be (R. 114). Appellant at the July 3 hearing objected that disputes could not be submitted to that body *ex parte*, that is, without mutual agreement (Tr. 35 et seq.) so on that same day appellee submitted the same dispute to the National Railroad Adjustment Board, First Division (R. 114, R. 56 et seq.), to which there is no question but that *ex parte* submission may come.⁶ If appellant was right that under the agreement creating Special Board of Adjustment No. 434 disputes submitted to it *ex parte* cannot be decided by that body (Tr. 39), it will no doubt so rule. But in that event the very same dispute has been submitted to the First Division of the National Railroad Adjustment Board on the day

⁶ Section 3, First (i), quoted at page 15 of this brief, 45 U.S.C. § 153, First (i).

of the hearing below (R. 54, 56, 114), which by the Act⁷ as well as the Supreme Court's pronouncement⁸ may decide the dispute, whether by *ex parte* or joint submission. One place or the other, this dispute over the application of the agreement of June 25, 1964, will be decided, if agreement continues to elude the parties here.

C. The dispute being a "minor" one, "self-help" or a strike by appellant is unlawful.

A reading of appellant's brief discloses that it and appellee are not, apparently, far apart in their basic concept of the law, as the cases construe the Act. We both agree that "self-help"—strikes or lockouts—is denied where the dispute is a "minor" one, involving the interpretation or application of a written contract provision, or in railroad parlance an "existing rule" in a "schedule." It is equally clear that "self-help"—strikes or lockouts—is denied the parties even in a "major dispute" until all the mediatory requirements imposed on the National Mediation Board by Section 5 of the Act have been fulfilled. The injunction issued below was warranted on either basis; either this was a "minor" dispute, in respect of which arbitration, not a strike, is the only legal solution⁹ or, if it was a "major" dispute, the "peaceful settlement" procedures of the Act had

⁷ Section 3, First (i).

⁸ *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S. 30, 77 S. Ct. 635, 1 L. Ed. 2d 622 (1957).

⁹ *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S. 30, 77 S. Ct. 635, 1 L. Ed. 2d 622 (1957).

not yet been completed and a strike could be lawfully enjoined without running afoul of the strictures of the Norris-LaGuardia Act.¹⁰

But of course this dispute was and is one involving only the interpretation or application of an existing agreement between appellant and appellee, Article II, Section 1, of the June 25, 1964, White House Agreement which, while committing both on a "national basis," bade them work out how it would be applied on a local basis. Appellee's Circular of July 24, 1964, and appellant's notice of August 3 of that same year exemplify only their conflicting views as to what was "suitable lodging" or an "equitable allowance in lieu thereof" under Article II, Section 1, of the White House Agreement.

III

An injunction is clearly warranted in this case.

Again, as in other aspects of its argument, appellant is not far away from appellee on the rules of law applicable to railway industry strikes or imminent strike threats. The argument, if any, comes simply over the application of these rules.

Somehow appellant attempts to argue that the restraints of the Norris-LaGuardia Act¹¹ precluded the court below from the issuance of a temporary injunc-

¹⁰ *Virginia Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 57 S. Ct. 592, 81 L. Ed. 789 (1937); *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768, 72 S. Ct. 1022, 96 L. Ed. 1283 (1952); *American Airlines, Inc. v. Air Line Pilots*, 169 F. Supp. 777 (D.C. S.D. N.Y. 1958).

¹¹ 29 U.S.C. § 101-115, 47 Stat. 70.

tion, apparently because appellant seeks to make the dispute over the *application* of Article II, Section 1, of the June 25, 1964, agreement something different from the agreement itself. This is of course a meaningless quibble.

And even if it were not a complete and deliberate misconception of the facts in this case, appellant's position would be erroneous. It is too well settled to stand much citation here that "self-help" may not be resorted to in "minor disputes" under the Act.¹² There has been no deviation from this rule in any of the courts since the *Chicago River* case was handed down in 1957; it is inherent as well as expressly stated in that decision that the Norris-LaGuardia Act has no application to cases involving minor disputes such as the one presently before this Court.

It is crystal clear from the very beginning of the handling, on a national basis, of the 1959-1960 national work rules disputes, through every type of known commission and some novel ones, through the Congress respecting the engine and train manning issues, and at the White House on the unresolved work rules disputes, that national policy required the peaceful settlement, without strikes, of all aspects of those disputes. There can be no valid contention that the dispute here involved, and submitted to either or both appropriate tribunals under Section 3 of the Act, was not a part of that national handling and its final resolution. The ap-

¹² *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S. 30, 77 S. Ct. 635, 1 L. Ed. 2d 622 (1957).

plication of the "White House Agreement" on the issue here in dispute necessarily had to be handled on a local basis. However, this did not open the door to strike action.

Indeed, it is unthinkable that this dispute, which is such an integral part of the national handling of all disputes on a nonstrike basis, could suddenly become a strikeable issue. If this were so, the application and interpretation of every other agreement reached over these long and trying years is also subject at all times to strike action. This clearly would subvert both the policy of the Act and the mandatory procedures applicable to "minor disputes" under Section 3. The court below simply implemented the law and also the policy behind the settlement of all such disputes, including this one.

It is well established that the procedures of the Act are mandatory, that even in "major disputes" (which this is not) self-help may not be resorted to until all these procedures have been exhausted, and that the district courts have jurisdiction and power to issue necessary injunctive orders to enforce compliance notwithstanding the provisions of the Norris-LaGuardia Act.¹³

As the court below found, this dispute is a minor one and has been submitted to Special Board of Adjustment No. 434 and the National Railroad Adjustment

¹³ *Virginia Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 563, 57 S. Ct. 592, 607, 81 L. Ed. 789 (1937); *B. of R.T. v. Howard*, 343 U.S. 768, 774, 72 S. Ct. 1022, 1025, 96 L. Ed. 1283 (1952); *American Airlines Inc. v. Air Line Pilots*, 169 F. Supp. 777, 787 (D.C. S.D. N.Y. 1958); cf. *Pa. R.R. Co. v. Transport Workers*, 202 F. Supp. 134 (D.C. E.D. Pa. 1962).

Board, First Division (R. 114), for the purpose of resolving the parties' difficulties over the application of the June 25, 1964, agreement on the point here disputed. As that court also found, the National Mediation Board has not taken any of the actions required of it by Section 5 of the Act (R. 113). On either basis, therefore, the temporary injunction below was rightly issued and the judgment below should be affirmed. It should be affirmed, however, on the correct basis concluded by the court below, that the dispute was—and is—a “minor dispute” and as such subject to resolution under Section 3 of the Railway Labor Act and not by self-help on the part of either party.

CONCLUSION

The unobjected-to Findings of Fact entered by the court below amply support its Conclusions of Law that the dispute here involved is a “minor dispute” over the application and interpretation of the June 25, 1964, “White House Agreement” on this property and that since it has been submitted for adjudication to an appropriate tribunal under Section 3 of the Act, a strike by appellant ORC&B to compel agreement on such a dispute is unlawful and enjoined.

Respectfully submitted,

DAVIES, BIGGS, STRAYER, STOEL
AND BOLEY

HUGH L. BIGGS
JAMES P. ROGERS
GARRY R. BULLARD
1410 Yeon Building
Portland, Oregon 97204

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

JAMES P. ROGERS
Of Attorneys for Appellees



APPENDIX I

THE UNITED STATES DISTRICT COURT
FOR THE DISRICT OF OREGON

SPOKANE, PORTLAND & SEATTLE)	
RAILWAY COMPANY, A Washington)	
corporation, OREGON TRUNK RAIL-)	
WAY, a Washington corporation, and)	
OREGON E L E C T R I C RAILWAY)	Civil No.
COMPANY, an Oregon corporation,)	65-278
Plaintiffs,)	
vs.)	FINDINGS
ORDER OF RAILWAY CONDUCT-)	OF FACT AND
TORS AND BRAKEMEN, a voluntary)	CONCLUSIONS
unincorporated association. T. M. DE-)	OF LAW
LANEY, individually and as General)	
Chairman, LEO HOLZSCHUH, EARL)	
A. JONES, E. O. BUDAHL, and M. H.)	
MEISTRELL, individually and as Local)	
Chairmen,)	
Defendants.)	

The above-entitled cause came on regularly to be heard before the undersigned Judge of the above-entitled court on July 3, 1965. Plaintiffs appeared by their attorneys Hugh L. Biggs, Garry R. Bullard, and James P. Rogers. Defendants appeared by their attorneys Clifford D. O'Brien and Harry J. Wilmarth.

Based upon the pleadings and exhibits herein, and the arguments of counsel, the Court being fully advised therefrom hereby makes and enters the following

FINDINGS OF FACT

I

Plaintiff Spokane, Portland & Seattle Railway Com-

pany is a corporation organized and existing under the laws of the State of Washington with its general offices at Portland, Oregon, and is a common carrier engaged in interstate commerce by railroad and is a carrier within the meaning of that term as defined in the Railway Labor Act, and is subject to the provisions of that Act and to the Interstate Commerce Act. Plaintiff Oregon Trunk Railway is a corporation organized and existing under the laws of the State of Washington with its general offices in Portland, Oregon, and is a wholly owned subsidiary corporation of Plaintiff Spokane, Portland & Seattle Railway Company. Plaintiff Oregon Electric Railway Company is a corporation organized and existing under the laws of the State of Oregon with its general offices in Portland, Oregon, and is a wholly owned subsidiary corporation of plaintiff Spokane, Portland & Seattle Railway Company. The plaintiffs enter into collective bargaining agreements with representatives of employees under the Railway Labor Act (45 U.S.C., Secs. 151 et seq.) as a common entity known as the "SP&S Railway Company System Lines." When used herein, the word "plaintiffs" shall mean "SP&S Railway Company System Lines."

II

Plaintiffs own and operate a railroad system of over 935 miles in interstate and intrastate commerce, with main lines in and servicing the States of Washington and Oregon from Portland, Oregon, to Spokane, Washington, and subsidiary or branch lines of railroad in the States of Washington and Oregon encompassing the mileage above stated. Plaintiffs are an integral part of the na-

tionwide railway systems of the United States and connect and interchange freight and passengers with numerous other railroads at many points in the states in which they operate. Plaintiffs carry mail for the United States and continually transport United States military personnel and quantities of national defense material. Plaintiffs serve directly scores of industrial plants and business enterprises, and transport in excess of 25,000 tons of freight and 375 passengers each working day. They have an investment in railroad rolling stock, equipment, and physical property of approximately \$148,000,000, and employ approximately 2,500 persons.

III

Defendant Order of Railway Conductors and Brakemen, hereafter sometimes referred to as "ORC&B," is a voluntary unincorporated association and a labor organization national in scope with offices in various parts of the United States including Vancouver, Washington. Said association is subject to the Railway Labor Act, and at all times material herein has been and is the recognized and acting collective bargaining agent, pursuant to the aforesaid Act, for certain of plaintiffs' employees of the classes and crafts known as conductors and brakemen. Defendant T. M. Delaney is the General Chairman of said organization on plaintiffs' lines, and defendants Holzschuh, Jones, Budahl, and Meistrell are Local Chairmen on various portions of plaintiffs' lines. All of said defendants personally named herein are authorized to and do represent said association in dealings with plaintiffs concerning the subjects encompassed by the

Railway Labor Act above cited, and represent plaintiffs' employees in the crafts and classes above described.

IV

Rates of pay, rules, and working conditions of conductors and brakemen on the plaintiffs' property are presently set forth in and governed by the provisions of collective bargaining agreements and subsequent amendments, including those herein described, between plaintiffs and ORC&B. Plaintiffs have duly performed all the terms and conditions contained in each agreement on their part to be performed and are ready, willing, and able to continue to do so.

V

On or about July 14, 1952, plaintiffs and defendant ORC&B entered into an agreement, designated as "Appendix E" to the collective bargaining agreement between plaintiffs and defendant ORC&B, relating to the pooling of cabooses. Paragraph (c)(1) of said agreement, designated Article 7 of said "Appendix E," provides:

"(1) Whenever the carrier desires so to pool its cabooses, it shall give notice to the General Chairman of such intention, specifying the territory and service involved, whereupon the carrier and employee representatives shall, within 30 days, endeavor to agree upon any facilities that should be furnished to provide accommodations substantially equivalent to those formerly available on the cabooses and used by the employees and on appropriate arrangements for supplying and servicing such pooled cabooses."

Pursuant to the above-quoted provisions plaintiffs elect-

ed to pool cabooses and, on or about April 10, 1958, entered into an agreement with defendant ORC&B which in part provided as follows:

"4. When trainmen in pool and unassigned freight service are provided with pooled cabooses, their basic rate will be increased one cent (1¢) per mile in addition to the established basic through freight rate. This to apply to mileage claimed and paid for as per time slip.

"It is understood that the one cent (1¢) per mile applicable to pool and unassigned freight service will also apply to pool and unassigned freight crews when required to perform unassigned way freight, or paid the way freight rate under the Conversion Rule, or when required to perform unassigned work train or unassigned snow service, in addition to the existing rates applicable to such service.

"5. Train crews to whom this agreement is applicable, if tied up between terminals where there are no accommodations to eat or sleep, will be paid continuous time at the pro rata rate while so tied up.

"6. This agreement is without prejudice or precedent to any other practice heretofore recognized and agreed upon by the Carrier and the Organization, but supersedes any conflict arising therefrom."

Following this agreement pool caboose assignments were established by plaintiffs in certain territories on its system and the mileage allowances were paid in accordance with said agreement.

VI

On June 25, 1964, an agreement was entered into between certain carriers, including plaintiffs, represented by the National Railway Labor Conference and the Eastern, Western and Southeastern Carriers' Conference Committees and employees of such carriers represented by the ORC&B and other railway operating organizations, in disposition of certain portions of the carriers' notices of November 2, 1959, and the organizations' notices of September 7, 1960. Said notices included an issue relating, among other things, to proposals by the national operating organizations of employees for lodging and meals when away from home terminal or allowances in lieu thereof. After disposition under Public Law 88-108 of the "firemen on diesel" and "train manning" issues, the remaining issues were disposed of by the National Agreement of June 25, 1964, Article II, Section 1 of which provided:

"ARTICLE II—EXPENSES AWAY FROM HOME:

"Section 1—

"When the carrier ties up a road service crew (except short turnaround passenger crews), or individual members thereof, at a terminal (including tie-up points named by assignment bulletins, or presently listed in schedule agreements, or observed by practice, as regular points for tying up crews) other than the designated home terminal of the crew assignment for four (4) hours or more, each member of the crew so tied up shall be provided suitable lodging at the carrier's expense or an equitable allowance in lieu thereof. Suitable lodging or an

equitable allowance in lieu thereof shall be worked out on a local basis. The equitable allowance shall be provided only if it is not reasonably possible to provide lodging.

“If an allowance is being made in lieu of lodging as well as other considerations under provisions of existing agreements, the amount attributed only to lodging shall be removed if suitable lodging is supplied, or offset against an equivalent allowance. This shall be worked out on a local basis.

“The provisions of this Section shall be made effective at a date no later than 30 days following the effective date of this Agreement.”

In addition, said Agreement in Article VII provides:

**“ARTICLE VII—SETTLEMENT OF
DISPUTES:**

“Any disputes involving the interpretation or application of this Agreement shall be settled by the parties in accordance with the established procedures therefor, including the creation of Special Boards of Adjustment and other procedures of Section 3 of the Railway Labor Act.”

VII

In conference with representatives of defendant ORC&B on June 18, 1964, and again on July 13 and July 21, 1964, plaintiffs notified said representatives of defendant ORC&B that effective July 25, 1964, and in accordance with the agreement of June 25, 1964, it would provide suitable lodging at the carriers' expense or an adequate allowance in lieu thereof and was discontinuing the mileage allowance in lieu of the lodging al-

lowance provided under the pooled caboose agreements above set forth. On July 24, 1964, plaintiffs promulgated Circular No. 65, reading as follows:

“Circular No. 65

“ALL CONCERNED:

“Effective July 25, 1964 and until further notice, whenever a road service crew is tied up at a terminal other than the designated home terminal of the crew assigned for four hours or more, each member of the crew so tied up will be provided lodging at the following locations:

Spokane—Coeur d’Alene Hotel

Pasco—Pioneer Hotel

Wishram—SPS Hotel

Bend—Colonial Hotel

Albany—Albany Hotel

Eugene—Lane Hotel

Astoria—Astor Hotel

Seaside—Chillquist Rooming House

Vernonia—Hy-van Hotel

“A survey recently taken of lodging then being used by train and enginemen at the above points indicated that while some were using accommodations listed above, others had made different lodging arrangements. Therefore, although accommodations will be available at the above-named establishments, if any crew member desires to keep his present arrangement, he may do so in which event he will be allowed \$1.50 for each layover period during which he is tied up for more than four hours at the away-from-home terminal of his assignment. This allowance may be claimed on the service slip for the particular trip.

"While the above arrangement is in effect, the allowance in lieu of lodging presently being made to certain train crew members in pooled caboose territory will be removed."

VIII

By letter dated August 3, 1964, Defendant T. M. Delaney on behalf of the ORC&B sent to plaintiffs a notice reading as follows:

"Our negotiations to date have failed to produce an agreement as to the type, quality or location of suitable lodging, or equitable allowance in lieu thereof. We propose that an agreement be reached in accord with Section 6 of the Railway Labor Act, which will provide that acceptable suitable lodging shall include:

"(1) A large single room, well ventilated, heated, lighted, air conditioned, with bath facilities, well finished wood or carpeted floors and closet or large locker storage space. Room is to be equipped with chairs and dresser and full size standard bed with new Simmons 400 mattress and springs, or one of equal quality. Room to be maintained in a suitable manner with linen to be changed after each use.

"(2) The lodging mentioned in Paragraph (1) to be located not more than one-fourth miles from point where crews are required to register and/or off duty, or suitable transportation furnished between lodging and points of reporting for duty, or going off duty. Call service will be provided by carrier.

"(3) In lieu of requirements of above Paragraphs (1) and (2), an equitable allowance

per trip will be six dollars (\$6.00) to be paid by check separate and apart from wages and earnings.

“Please advise me promptly whether you are agreeable to these provisions, or as to a date for conference concerning this proposal, as provided by the Railway Labor Act.”

On August 10, 1964, plaintiffs advised defendant T. M. Delaney and defendant ORC&B of its disagreement with the effectiveness, pursuant to Section 6 of the Railway Labor Act, of the ORC&B notice of August 3, 1964, by letter reading as follows:

“This will acknowledge your letter of August 3 in which you state that ‘our negotiations to date have failed to produce an agreement as to the type, quality or location of suitable lodging, or equitable allowance in lieu thereof’. You then proposed an agreement be reached in accord with Section 6 of the Railway Labor Act which would embody your interpretation of the terms ‘suitable lodging’ and ‘equitable allowance’.

“It is my position that your notice of August 3 is improper in view of Article VII of the agreement of June 25, 1964, reading—

“ ‘Any dispute involving the interpretation or application of this Agreement shall be settled by the parties in accordance with the established procedures therefor, including the creation of Special Boards of Adjustment and other provisions of Section 3 of the Railway Labor Act.’

which makes your so-called notice under the Railway Labor Act not only improper but a specific violation of the Agreement.

"Your attention is also directed to Item 4 on page 4 of the 'Settlement and Determination of the Mediators' with respect to the National Agreement which reads in part—

" 'We note, however, that this is a negotiated Agreement voluntarily entered into and therefore is a responsibility on the Parties in respect to their own interest and that of the Public to view the Agreement as having established a relationship as concerns the issues included for at least the ensuing two years.' "

which is evidence that such a notice will continue to be improper for the two-year period to which the Mediators refer.

"We already have a conference scheduled for 10:00 a.m., Thursday, August 13, on another matter and possibly we could further discuss Article II of the June 25, 1964, Agreement during that conference."

IX

On August 20, 1964, the National Mediation Board sent the following telegraphic message to plaintiffs:

"H. J. Tierney, Chief of Personnel
Spokane, Portland and Seattle Railway Co.,
Portland, Org.

"Following wire received from ORC&B 'SP&S Railway has unilaterally and illegally abrogated agreement effective 4-15-58 thereby effecting a wage cut of \$30 to \$50 a month to employees represented by this organization. Mediation is hereby invoked. You are requested to direct this carrier to restore wages provided under this agreement and maintain status quo pending mediation and further proceedings as provided by Section 5 of the Railway Labor Act.

Unless we are promptly notified carrier has restored wages of these employees a withdrawal from service will be authorized.' Please wire statement.

"Thomas A. Tracy, Exec. Secy., NMB."

In response thereto plaintiffs sent the following telegram dated August 21, 1964, to the National Mediation Board:

"Thomas A. Tracy
Executive Secretary
National Mediation Board
Washington, D. C.

"Your telegram 20th. On July 25, 1964 Carrier began furnishing lodging facilities to train and engine crews under the terms of Article II, Section 1, of the National Agreement of June 25, 1964.

"To train crew members covered by the Pooling Cabooses Agreement dated April 10, 1958, that portion of said Agreement providing for an allowance in lieu of lodging was removed in accordance with that portion of Article II, Section 1, of the National Agreement of June 25, 1964 reading:

" 'If an allowance is made in lieu of lodging as well as other considerations under provisions of existing agreements, the amount attributed only to lodging shall be removed if suitable lodging is supplied or offset against an equivalent allowance. . . . '

"When several conferences failed to resolve the disputes which arose from this handling, the Carrier requested the Organization to join them in handling the issues in accordance with terms of Article VII of the National Agreement of June 25, 1964.

"The next development was receipt of the information contained in your wire of August 20, 1964, which was received while Carrier was in conference with the General Chairman of the ORC&B discussing the issues with which that telegram concerned itself.

"During this conference Agreement was reached with ORC&B that status quo conditions existent July 24, 1964 concerning Article II, Section 1, of the National Agreement of June 25, 1964 and the effect of that Article on the Pooling Cabooses Agreement dated April 10, 1958 would be restored pending further local negotiations on the property and that such status quo would remain in effect so long as efforts to resolve the disputed areas were being made in consonance with the terms of the National Agreement of June 25, 1964.

"Conference for this purpose has been scheduled commencing Monday, August 24, 1964.

"N. S. WESTERGARD
Vice President & General Mgr.
SP&S Railway Company."

No further action was taken by the National Mediation Board in connection with the ORC&B notice described in the telegram of August 20 herein set forth until its telegram to plaintiffs of November 12, 1964, hereafter set forth.

X

On September 15, 1964, the International President of defendant ORC&B, G. N. Harris, sent a telegram to defendant T. M. Delaney, which read as follows:

"Is your authority to withdraw from the service

of the SP&S employees represented by this organization at 8:00 AM Wednesday September 16 1964, due to the carrier's refusal to restore the special allowance provided for in your pooling caboose agreement pending settlement of the dispute emanating from the application of Article II Section 1 of the June 25 1964 agreement."

On the same day plaintiffs through N. S. Westergard, their Vice President and General Manager, and defendant T. M. Delaney met in conference in Portland, Oregon, and reached an agreement reading as follows:

"Mr. T. M. Delaney, General Chairman,
Order of Railway Conductors and Brakemen,
Vancouver, Washington

"Dear Mr. Delaney:

"We hereby agree to the following in connection with our dispute as to the interpretation of Section 1, Article II of the National Agreement dated June 25, 1964:

"Until we mutually agree otherwise, the status quo as of July 24, 1964, will be preserved with respect to those trainmen who are covered by the so called pooled caboose agreement dated April 10, 1958.

"The strike of employees whom you represent which has been scheduled for 7:00 AM, Wednesday, September 16, 1964, is hereby cancelled.

"Yours truly,

/s/ N. S. WESTERGARD
Vice President and
General Manager

"Agreed to:

/s/ T. M. DELANEY

General Chairman

Order of Railway Conductors
and Brakemen"

XI

On November 12, 1964, plaintiffs received a telegram from the National Mediation Board, which read as follows:

"N. S. Westergard

"Have received following telegraphic application from ORC&B this date — ' — Account the Spokane, Portland & Seattle Railway's refusal to negotiate on Organization's Section 6 notice dated August 3rd, 1964 requesting an agreement for suitable lodging or an equitable allowance in lieu thereof for employees represented by the Order of Railway Conductors & Brakemen mediation is hereby invoked.' Request any statement you may care to make regarding this application.

"THOMAS A. TRACY, Exec. Secy., NMB."

In response to the National Mediation Board's foregoing-stated request for the position of plaintiffs, plaintiffs replied by letter dated November 16, 1964, which reads as follows:

"Mr. Thomas A. Tracy

Executive Secretary

National Mediation Board

Washington, D. C.

"Dear Mr. Tracy:

"Referring to your telegram of November 12, advis-

ing that your Board is in receipt of an application for mediation from the Order of Railway Conductors and Brakemen covering a dispute between that organization and this Company on the following subject, and requesting a statement in behalf of the Company:

“ ‘Organization’s Section 6 notice of August 3, 1964 requesting adoption of certain rules governing lodging facilities.’

“This dispute has to do with application of Section 1 of Article II—Expenses Away From Home—of the Agreement of June 25, 1964 between carriers represented by the National Railway Labor Conference and the Eastern, Western and Southeastern Carriers’ Conference Committees and their employees represented by the five operating organizations. Such provision reads as follows:

“ ‘When the carrier ties up a road service crew (except short turnaround passenger crews), or individual members thereof, at a terminal (including tie-up points named by assignment bulletins, or presently listed in schedule agreements, or observed by practice, as regular points for tying up crews) other than the designated home terminal of the crew assignment for four (4) hours or more, each member of the crew so tied up shall be provided suitable lodging at the carrier’s expense or an equitable allowance in lieu thereof. Suitable lodging or an equitable allowance in lieu thereof shall be worked out on a local basis. The equitable allowance shall be provided only if it is not reasonably possible to provide lodging.

“ ‘If an allowance is being made in lieu of lodging as well as other considerations under pro-

visions of existing agreements, the amount attributed only to lodging shall be removed if suitable lodging is supplied, or offset against an equivalent allowance. This shall be worked out on a local basis.

“ ‘The provisions of this Section shall be made effective at a date no later than 30 days following the effective date of this Agreement.’

“The June 25, 1964 Agreement also contains Article VII—Settlement of Disputes—which reads as follows:

“ ‘Any disputes involving the interpretation or application of this Agreement shall be settled by the parties in accordance with the established procedures therefor, including the creation of Special Boards of Adjustment and other procedures of Section 3 of the Railway Labor Act.’

“Notwithstanding the fact that the ‘suitable lodging’ dispute was disposed of by Article II, Section 1, in the then tentative agreement which was officially ratified by the unions to become effective three days later, or June 25, 1964, and the further fact that the June 25, 1964, Agreement, in Article VII thereof quoted above, contained a required procedure for the settlement of any disputes involving interpretation or application of that Agreement, including Article II, Section 1, ORC&B General Chairman Delaney, on August 3, 1964 served the purported Section 6 notice which is the subject of the organization’s invocation to which your letter refers, in clear violation of Article VII of the Agreement and, consequently, of the Railway Labor Act.

“Meantime, the undersigned has been meeting not

only with ORCB General Chairman Delaney but the Chairman of BLE and BLF&E as well in an attempt to reach a mutually satisfactory interpretation of the language appearing in Section 1 of Article II—'Expenses Away From Home' of the June 25, 1964 National Agreement. Although no written agreement has yet been signed disposing of this matter with any of the three Chairmen, we have reached tentative agreement with BLE and BLF&E and hope to have the agreement signed this week.

"Insofar as ORC&B is concerned, in my letter October 23, file 1150-a, to Mr. Delaney, a conference date was suggested for November 10 to further discuss the matter of suitable lodging under Section 1 of Article II cited above, but Mr. Delaney failed to appear for conference.

"It is urgently requested that, on the clear basis of the impropriety and illegality of the organization's purported Section 6 notice, and the equally clear procedure which must be followed for the settlement of disputes involving interpretation or application of the provisions of the June 25, 1964 Agreement, the National Mediation Board reject the organization's application for its mediatory services, and that it point out to the organization that, if it is unable to resolve the controversy on the property, the proper and only avenue for adjudication is specified in Article VII of that Agreement.

"Very truly yours,

/s/ N. S. WESTERGARD
Vice President and
General Manager"

From November 16, 1964, to the present time the National Mediation Board has taken none of the actions required of it by Section 5 of the Railway Labor Act, as amended (45 U.S.C. Section 154) when there is involved between carriers and labor organizations the type of rule changes described by Section 6 of that Act.

On November 25 and November 27, 1964, agreements were reached between plaintiffs and the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Locomotive Engineers, respectively, implementing Article II, Section 1, of the June 25, 1964, agreement respecting suitable lodging or an equitable allowance in lieu thereof. On January 27, 1965, plaintiffs' representatives met with defendant T. M. Delaney and G. P. Lechner, International Vice President of defendant ORC&B, in an unsuccessful attempt to resolve their differences under the same provision of the June 25, 1964, agreement. No further conferences have been held between plaintiffs and defendant ORC&B on the subject.

XII

On June 2, 1965, plaintiffs received a telegram from the National Mediation Board reading as follows:

"N. S. Westergard, VP & GM
Spokane Portland & Seattle Railway Co
Portland Org

"Following telegram has been received from G. H. Harris, President, ORC&B. Quote Account of Carrier's refusal to bargain realistically on our Section 6 notice of August 3, 1964, this is your authority to withdraw from service, employees of the Spokane,

Portland, and Seattle Railway represented by this organization at 6:00 AM June 7, 1965 unquote. Please advise return wire subject this dispute and present status.

“THOMAS A. TRACY, Executive Secretary
National Mediation Board”

In railroad parlance a reference to a withdrawal from service is equivalent to a statement of intention to strike.

On June 4, 1965, conference was held between H. J. Tierney, Chief of Personnel of the plaintiffs, and defendant T. M. Delaney, during which conference defendant Delaney advised plaintiffs through H. J. Tierney that defendant ORC&B would strike plaintiffs commencing at 6:00 a.m. June 7, 1965.

XIII

Pursuant to Section 3 SECOND of the Railway Labor Act plaintiffs and defendant ORC&B had, by agreement dated October 20, 1961, established a special board of adjustment known as “SP&S Ry.-ORC&B Special Board of Adjustment No. 434.” Subsequent to the agreement establishing such Board plaintiffs and defendant ORC&B had submitted to such Board all unresolved disputes between them arising prior to the present dispute. All disputes so submitted to Special Board of Adjustment No. 434 had been submitted by mutual agreement. On June 3, 1965, plaintiffs submitted to such Special Board of Adjustment the dispute between it and defendant ORC&B concerning the application and implementation of Article II, Section 1, of the June 25, 1964, agreement, without the consent of defendant

ORC&B, known in railway parlance as an "*ex parte* submission." Defendant ORC&B objected to such submission on the ground that Special Board of Adjustment No. 434 had jurisdiction to hear and determine only such disputes as were submitted by mutual agreement, and so advised the Chairman thereof.

On July 3, 1965, plaintiffs submitted said dispute to the National Railroad Adjustment Board, First Division, but did not recede from its position that said dispute was properly before Special Board of Adjustment No. 434.

XIV

Defendants have not withdrawn the strike notice of June 3, 1965. A strike against plaintiffs by defendants would shut down all of plaintiffs' operations by rail in the States of Washington and Oregon and would cause irreparable injury to plaintiffs, other railroads with which it connects, shippers on plaintiffs' lines and other lines with which it connects, and cause the lay-off of approximately 2,500 employees not involved in the dispute between plaintiffs and defendant ORC&B. Plaintiffs are without adequate remedy at law.

Based upon the pleadings, exhibits, findings of fact, and opinion herein, the Court now makes and enters the following

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the action and of the parties hereto.

2. The dispute between plaintiffs and defendant ORC&B is a minor dispute under the provisions of the Railway Labor Act, as amended (45 U.S.C. Section 151 et seq.), and as such is properly referable to an appropriate tribunal under Section 3 of that Act for adjudication of such disputes, in the event the parties are unable to reach agreement thereon.

3. A strike by defendant ORC&B to compel agreement on said dispute is unlawful and enjoined.

4. Plaintiffs are entitled to a temporary injunction in this cause restraining and preventing defendants from striking or otherwise interfering with plaintiffs' operations over the interpretation or application of Article II, Section 1, of the agreement of June 25, 1964, until the final order of this Court.

Done at Portland, Oregon, this 3rd day of August, 1965.

WILLIAM G. EAST
District Judge

Approved as to form July 27, 1965.

CLIFFORD D. O'BRIEN
Of Attorneys for Defendants

No. 20327

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PAUL M. DUBOIS,

vs.

Appellant,

UNITED STATES OF AMERICA, and GENERAL ELECTRIC
COMPANY,

Appellees.

REPLY BRIEF OF GENERAL ELECTRIC COMPANY, APPELLEE.

MERSERVE, MUMPER & HUGHES,

By CLIFFORD B. HUGHES,
CROMWELL WARNER, JR.,

612 South Flower Street,
Suite 500,
Los Angeles, Calif. 90017,

*Attorneys for General Electric
Company, Appellee.*

FILED

NOV 26 1965

FRANK H. SCHMIDT, CLERK

TOPICAL INDEX

	Page
Statement of basis of jurisdiction	1
Statement of the case	3
Argument	4
I.	
An incompetent person, domiciled in the State of California, lacks the capacity to sue in a United States District Court located within the State of California	4
II.	
Where the defect is shown upon the face of the complaint, a motion to dismiss for lack of capacity to sue is proper	5
III.	
Appellant's complaint shows his incapacity upon its face	6
IV.	
The inquiry was proper and the judgment was appropriate	8
Conclusion	9

TABLE OF AUTHORITIES CITED

Cases	Page
Brush v. Haskins, 9 F.R.D. 604	5
Coburn v. Coleman, 75 F. Supp. 107	5
Gale v. Wagg, 140 F. Supp. 6	9
Hershel California Fruit Products Co. v. Hunt Foods, 119 F. Supp. 603	5
Klopstock v. Superior Court, 17 Cal. 2d 13	4
Lewis v. Fontenot, 110 F. 2d 65, cert. den. 61 S. Ct. 22, 311 U.S. 646, 85 L. Ed. 413, reh. den., 61 S. Ct. 168, 311 U.S. 727, 85 L. Ed. 473	9

Dictionaries

Taber's Cyclopedic Medical Dictionary, Edition Nine,	7
Webster's New International Dictionary, Second Edi- tion, unabridged	6, 7

Rules

Federal Rules of Civil Procedure, Rule 8	8
Federal Rules of Civil Procedure, Rule 9(a)	5
Federal Rules of Civil Procedure, Rule 12	8
Federal Rules of Civil Procedure, Rule 17(b)	4, 5

Statutes

Code of Civil Procedure, Sec. 372	4, 6
United States Code, Title 28, Sec. 1291	2
United States Code, Title 28, Sec. 1331	2
United States Code, Title 28, Sec. 1346(b)	2
Probate Code, Sec. 1435.2	6
Probate Code, Sec. 1460	6

Textbook

Barron & Holtzoff, Sec. 301	5
-----------------------------------	---

No. 20327

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

PAUL M. DUBOIS,

vs.

Appellant,

UNITED STATES OF AMERICA, and GENERAL ELECTRIC
COMPANY,

Appellees.

**REPLY BRIEF OF GENERAL ELECTRIC
COMPANY, APPELLEE.**

Comes now General Electric Company, a corporation, one of the defendants in the within proceedings and one of the appellees herein, and respectfully replies to appellant's opening brief as follows:

Statement of Basis of Jurisdiction.

A statement of the pleadings disclosing the basis upon which the District Court had jurisdiction is somewhat difficult. The complaint was prepared and filed herein by the plaintiff, Paul M. Dubois, "acting as his own attorney". The complaint allege that plaintiff is a resident of the City of Whittier, State of California, and is within the jurisdiction of the District Court of the United States, for the Southern District of California, Central Division [Tr. p. 2]. The complaint further alleges that "this action is brought under the Civil Rights Laws" [Tr. p. 2]. The amount in controversy is substantially in excess of \$10,000.00, exclusive of interest and costs [Tr. p. 5]. Plaintiff has apparently sought to bring his action within the grant of juris-

diction contained in 28 U.S.C. 1331. It is an action of a civil nature, the matter in controversy exceeds the sum or value of \$10,000.00 exclusive of interest and costs, and arises under laws of the United States, to wit, unspecified civil rights laws.

Furthermore, in view of the fact that the United States of America is a party defendant and is alleged to have committed a number of vague wrongs against the plaintiff while acting through and by certain unnamed agents, it is suggested that plaintiff has sought to bring his action within the jurisdictional grant of 28 U.S.C. 1346(b).

In view of the fact that plaintiff "acting as his own attorney" has sought to bring his controversy within specific grants of jurisdiction to the District Court, and since the appellees in the court below challenged initially the capacity of the plaintiff to sue, and that challenge was the only matter considered by the court below, it is respectfully submitted that the District Court had jurisdiction of the matter, at least for the limited purpose of determining the capacity of one of the parties before it, and properly considered that issue before reaching the question of subject matter jurisdiction upon its merits. In other words, the capacity of the plaintiff to act was challenged. The District Court was called upon to exercise its inherent jurisdiction over all matters pending before it and determine if the plaintiff had any capacity to be before it, even to determine the issue of subject matter jurisdiction. The District Court did, in fact, exercise this inherent jurisdiction, and it is respectfully submitted that it exercised it properly.

Assuming that there was at last the limited jurisdiction discussed above in the District Court, then the matter is properly before this court. 28 U.S.C. 1291.

A final judgment of dismissal was entered by the District Court [Tr. p. 30] and proper notice of appeal was taken to this court [Tr. p. 34].

Statement of the Case.

The plaintiff, the appellant herein, commenced the within action in the District Court "acting as his own attorney" by the filing of his complaint. The defendants named in the complaint were the United States of America and General Electric Company. Each of the named defendants moved the court to dismiss plaintiff's action on the ground that the complaint showed upon its face that the plaintiff lacked capacity to sue. Upon hearing these motions the trial court concurred and entered an order dismissing plaintiff's complaint without prejudice to its being renewed "in proper form".

The lack of capacity which appellees urged and the trial court found is predicated upon plaintiff's incompetency. The motions of the appellees as heard by the trial court, and the determination of the trial court, were based entirely upon the contents of the face of appellant's complaint. If this appellee understands appellant's point correctly, it is to the effect that a determination of incompetency cannot be made upon such a limited inquiry and that he was thus denied a fair hearing on this issue. Since appellant did not request in the trial court an opportunity to present evidence on the matter of his competency, it must be his further point, that as a matter of law, the trial court was duty bound, when presented with this issue, to ignore the allegations of plaintiff's complaint, and initiate its own inquiry upon the issue of plaintiff's competency. Appellee General Electric Company will direct its discussions which follow to these questions.

ARGUMENT.

I.

An Incompetent Person, Domiciled in the State of California, Lacks the Capacity to Sue in a United States District Court Located Within the State of California.

Rule 17(b) of the Federal Rules of Civil Procedure provides in part as follows:

“The capacity of an individual, * * * to sue or be sued shall be determined by the law of his domicile.”

The complaint asserts that the plaintiff resides, and thus presumably is domiciled, within the State of California.

In the State of California an incompetent person lacks the capacity to sue. Section 372 of the Code of Civil Procedure of the State of California provides in part as follows:

“When a minor, or an insane or incompetent person is a party, he *must* appear either by a guardian of the estate or by a guardian ad litem appointed by the court in which the action is pending, or by a Judge thereof, in each case.” (Emphasis added).

The nature of this incapacity has been described by the Supreme Court of the State of California in a case decided in 1941, *Klopstock v. Superior Court*, 17 Cal. 2d 13, at pages 18 and 19. The court states that the lack of capacity is a general disability. The incompetent has no capacity to sue and thus cannot lawfully cause the defendants to be brought into court, even if he has a good cause of action against them.

Under Federal Rule of Civil Procedure 17(b), the United States District Court must look to the law of the state of the domicile of the party in order to determine his capacity. In the present case the law to which the court must look is the law of the State of California. California law is that an incompetent person lacks the capacity to sue, that this is a general disability of such a nature that the incompetent cannot lawfully cause a defendant to be brought before the court unless the incompetent institutes the action by his general guardian or by a guardian *ad litem* appointed by the court in which the action is pending.

II.

Where the Defect Is Shown Upon the Face of the Complaint, a Motion to Dismiss for Lack of Capacity to Sue Is Proper.

Although Federal Rule of Civil Procedure 9(a) provides, "When a party desires to raise an issue as to * * * the capacity of any party to sue or be sued * * *, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.", it has been repeatedly held that where the want of capacity is apparent on the face of the complaint it may be raised by motion to dismiss. *Coburn v. Coleman* (D.C.W.D.S.C.), 75 F. Supp. 107; *Brush v. Haskins* (D.C.W.D.Mo.), 9 F.R.D. 604 at 609; *Hershel California Fruit Products Co. v. Hunt Foods* (D.C.N.D. Calif.), 119 F. Supp. 603 at 607; *Barron & Holtzoff*, Section 301.

Therefore, it must be concluded that if the complaint in the within action contains upon its face averments which demonstrate that the plaintiff-appellant lacks the

capacity to sue under laws of the State of California, the action was properly dismissed upon the motions of the appellees.

III.

Appellant's Complaint Shows His Incapacity Upon Its Face.

As noted above, the District Court is required to look to the laws of the State of California to determine the capacity of the appellant. Under such laws an *insane* or incompetent person lacks the capacity to sue. California Code of Civil Procedure, Section 372; California Probate Code, Section 1460; California Probate Code, Section 1435.2.

One may well wonder from a reading of appellant's complaint as to whether or not he is able properly to manage his property and business affairs without assistance. However, it is the question of insanity which caused the District Court to act as it did. The complaint is replete with plaintiff's allegations that he has major psychotic problems. He alleges that that he has suffered considerable emotional damage [Tr. p. 3]; that the loyalty, respect and affections of the members of the family of plaintiff were alienated and damaged [Tr. p. 4]; that plaintiff was prevented from fulfilling his natural and practical obligations to his family [Tr. p. 4]; and that "plaintiff has suffered great mental anguish caused by worry, anxiety, fear, intimidation and brain-washing, all of which in turn caused *schizophrenia*, lack of self confidence and a severely distorted private life." [Tr. p. 4]. (Emphasis added.)

Insane is defined in Webster's New International Dictionary, Second Edition, unabridged, as "Unsound;—

said of the mind; exhibiting unsoundness or disorder of mind;”. The word insanity is defined in the same work as “State of being insane; unsoundness or derangement of mind, esp. without recognition of one’s own illness. Insanity is rather a social and legal than a medical term, and implies mental disorder resulting in inability to manage one’s affairs and perform one’s social duties.” Taber’s Cyclopedic Medical Dictionary, Edition Nine, defines insanity as follows: “Legal term for mental derangement; a psychosis. A general term for unsoundness of mind or any mental disorder or *psychosis*.” (Emphasis added.)

Webster’s New International Dictionary, Second Edition, unabridged, defines schizophrenia as “A type of *psychosis* characterized by loss of contact with the environment and by disintegration of the personality. It includes dementia praecox and some related forms of insanity.” (Emphasis added). Taber’s Cyclopedic Medical Dictionary, Edition Nine, defines schizophrenia as “The most important of the *psychoses*, characterized by loss of contact with the environment and by disintegration of personality.” (Emphasis added.)

From the foregoing definitions it is certainly clear that schizophrenia is a form of insanity and that appellant, in his complaint, describes a series of psychoses which he himself stated caused schizophrana, as well as lack of self confidence and a severely distorted private life, which certainly indicate a disintegration of personality. The appellant chose his words and presumably he was describing his condition accurately, both as to the specifics which caused the condition and the consequence of the condition, which he described accurately, both in lay and medical terms. There can be no doubt that read

by its four corners or by the specific allegations to which appellees have directed reference the complaint shows that appellant is suffering from an unsoundness of mind of the type known as schizophrenia and of a type which the law considers to be insanity for the purpose of determining capacity.

IV.

The Inquiry Was Proper and the Judgment Was Appropriate.

In considering the matter before it, the trial court certainly ascribed to the words of the complaint their common and ordinary meanings, it complied with the mandate of Federal Rule of Civil Procedure 8 to liberally construe the document so as to do substantial justice and followed the intent and purposes of Rule 12. The only complaint which appellant has is that the trial Judge failed to conduct upon his own motion an inquiry, the purpose of which would be to prove that a number of the essential allegations of plaintiff's complaint were false. Our research has failed to disclose any authority requiring such an inquiry. Furthermore, appellant wholly overlooks the fact that it is obvious the trial court in fact was motivated by a desire to assist the appellant. In addition to being gravely concerned by the allegations of plaintiff's condition, the trial court was almost assuredly mindful of the allegations of plaintiff's complaint when measured by the other grounds of the Government's motion to dismiss, and the affirmative matters of defense alleged by General Electric Company. A cursory reading of the entire record discloses that as the allegations stand, all of the grounds of the Government's motion and the affirmative averments of the defendant General Electric Company are good de-

fenses to plaintiff's allegations. It is undoubtedly true that the vast procedural difficulties which plaintiff has created by his own complaint can best be resolved by a new action commenced upon any proper claims which plaintiff may have without the impediments which the present action contains. It is also likely that the learned District Judge exercised the same wisdom as District Judge Picard followed in *Gale v. Wagg* (D.C.E.D. Mich.), 140 F. Supp. 6, where, after reviewing a complaint filed *in propria persona* and involving a question of competency of the plaintiff, he said, at page 10 of the opinion, "The appointment of a guardian would merely prolong the agony."

In any and all events, and regardless of the motivations of the learned trial Judge, his disposition of this case was entirely proper. See *Lewis v. Fontenot* (C.C.A. 5), 110 F. 2d 65, certiorari denied, 61 S. Ct. 22, 311 U.S. 646, 85 L. Ed. 413, rehearing denied, 61 S. Ct. 168, 311 U.S. 727, 85 L. Ed. 473.

Conclusion.

It is respectfully submitted that the trial Judge acted properly upon all matters before him in accordance with the applicable procedural rules and substantive law, and by his order accomplished substantial and appropriate justice to all parties before him. The judgment below should be affirmed.

Respectfully submitted,

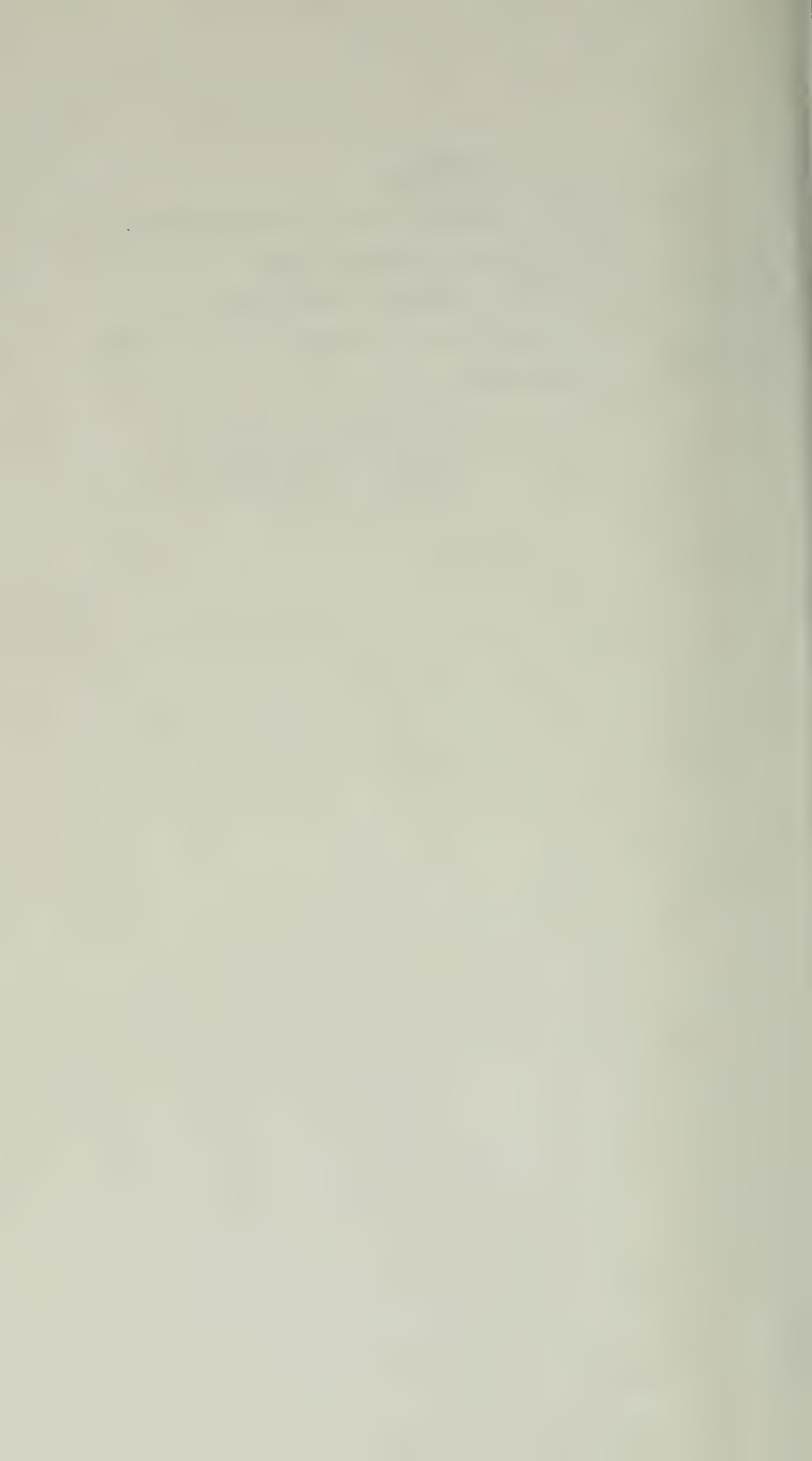
MESERVE, MUMPER & HUGHES,
By CLIFFORD B. HUGHES,
CROMWELL WARNER, JR.,
*Attorneys for General Electric
Company, Appellee.*

Certificate.

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing brief is in full compliance with those rules.

CLIFFORD B. HUGHES

CROMWELL WARNER, JR.



IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD T. LYNCH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

MANUEL L. REAL,
United States Attorney,
JOHN K. VAN DE KAMP,
Assistant U. S. Attorney,
Chief, Criminal Division,
J. BRIN SCHULMAN,
Assistant U. S. Attorney,
Assistant Chief, Criminal Division,
PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

FILED

FEB 4 1968

WM. D. LUCK, CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD T. LYNCH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

MANUEL L. REAL,
United States Attorney,
JOHN K. VAN DE KAMP,
Assistant U. S. Attorney,
Chief, Criminal Division,
J. BRIN SCHULMAN,
Assistant U. S. Attorney,
Assistant Chief, Criminal Division,
PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
I JURISDICTIONAL STATEMENT	1
II STATEMENT OF THE CASE	2
III ERRORS SPECIFIED	2
IV STATEMENT OF THE FACTS	3
V ARGUMENT	5
A. No Statements By The Prosecuting Attorney Violated Appellant's Constitutional Rights.	5
B. The Trial Court's Finding That Appellant Was Adequately Represented By Competent Counsel Should Be Upheld Upon Appeal.	9
VI CONCLUSION	12
CERTIFICATE	13

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Boyd v. Boyd, 169 N. E. 632	8
Broadcast Music v. Havana Madrid Restaurant Corp. , 175 F. 2d 77 (2nd Cir. 1949)	8
Carter Oil Co. v. Norman, 131 F. 2d 451 (7th Cir. 1942)	8
Griffiths Dairy v. Squire, 138 F. 2d 758 (9th Cir. 1943)	8, 10
Hearn v. United States, 194 F. 2d 647 (7th Cir. 1952), cert. denied 343 U. S. 968 (1952)	7, 9
Jensen v. United States, 326 F. 2d 891 (9th Cir. 1964)	7, 9
United States v. Oregon Med. Soc. , 343 U. S. 326 (1952)	7, 9
Wilson v. United States, 100 F. 2d 552 (9th Cir. 1938)	7

Constitution

United States Constitution:	
Fifth Amendment	3
Sixth Amendment	3

Statutes

Title 18, United States Code §2113	2
Title 28, United States Code §1291	1
Title 28, United States Code §1294	1
Title 28, United States Code §2255	1, 2

Rules

Federal Rules of Civil Procedure, Rule 52(a)	7
----------------------------------------------	---

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD T. LYNCH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California denying appellant's motion to vacate judgment and sentence under Title 28, United States Code, Section 2255.

The District Court had jurisdiction by virtue of Title 28, United States Code, Section 2255. This Court has jurisdiction under Title 28, United States Code, Sections 1291, 1294 and 2255.

II

STATEMENT OF THE CASE

Appellant was charged with robbery of a savings and loan association and assault under Title 18, United States Code, Section 2113 [Ex. A, pp. 2-4, 6]. ^{1/} He entered a guilty plea in the Southern Division of the Southern District of California on September 25, 1961 [Ex. A, pp. 1-4].

On October 16, 1961, appellant was sentenced to the custody of the Attorney General for a period of ten years (Ex. A, pp. 8, 16].

On June 17, 1964, appellant filed a motion to vacate judgment and sentence under Title 28, United States Code, Section 2255 [T.R. 13-32]. ^{2/} The hearing upon appellant's motion commenced on October 26, 1964, before United States District Judge Jacob Weinberger [T.R. 57-58]. The motion was denied on November 18, 1964 [T.R. 68].

III

ERRORS SPECIFIED

Appellant's brief, dated December 17, 1965, raises the following points upon appeal:

1. Statements by the prosecuting attorney to appellant's

^{1/} "Ex. A" refers to Defendant's Exhibit "A".

^{2/} "T.R." refers to the Transcript of Record.

counsel allegedly violated appellant's Constitutional rights.

2. Alleged ineffectiveness of appellant's counsel in violation of the Fifth and Sixth Amendments of the United States Constitution.

IV

STATEMENT OF THE FACTS

Appellant entered a guilty plea on September 25, 1961, to a charge of robbery of a savings and loan association and assault [Ex. A, pp. 2-4, 6].

On June 17, 1964, appellant filed a motion to vacate sentence and conviction [T.R. 13-32]. An earlier motion in the same proceeding was apparently filed on February 28, 1964 [T.R. 16].

The hearing upon the motion of June 17, 1964, commenced on October 26, 1964 [T.R. 57-58]. The testimony received at that hearing is not part of the record upon appeal herein.

The trial judge entered findings of fact regarding the evidence produced at the said hearing, including the following:

"Pierce M. Kavanagh, Esq. [appellant's counsel at the time of the guilty plea], graduated from law school in 1955, then went into the Coast Guard Service where he remained for three years with the rank of Lieutenant, J.G. During his period of service, Mr. Kavanagh represented military accused, served on Boards of Investigation and Boards of Inquiry. He was admitted to practice law in the State of New York, then for a year acted as Law Clerk in

the office of a Los Angeles attorney whose practice was almost exclusively criminal, and was admitted to practice law in all the Courts of California and in the United States Courts of this District in June of 1961. . . . "

"Mr. Kavanagh . . . discussed the case with the Assistant United States Attorney in Charge at San Diego, Mr. Elmer Enstrom, Jr., and the latter showed Mr. Kavanagh the United States Attorney's file with reference to the case, including the F. B. I. report. No arrangement for any 'deal' or recommendation for a particular sentence was discussed between Mr. Kavanagh and the United States Attorney. At a subsequent discussion Mr. Kavanagh indicated to petitioner that he understood the average sentence was five years, but stated that neither the Court nor the United States Attorney would make any commitment about what sentence might be given, and that petitioner might receive the maximum sentence; Mr. Kavanagh mentioned to petitioner that the file contained a confession of the co-defendant; that there was eye-witness testimony; that the bills recovered from petitioner were marked. Petitioner admitted to counsel his full complicity in the robbery. . . . Mr. Kavanagh did not, in any manner, indicate to petitioner that he would receive five years, or any particular period of time as a sentence if he pleaded guilty, and did not indicate to petitioner that the United States Attorney had made a statement that petitioner would

receive any particular sentence; that at the time of such latter conversation, petitioner stated he wished to plead guilty. " [T.R. 63-64].

The trial judge also noted that petitioner stated, at the time of the guilty plea, that he had not been influenced to plead guilty and that no promise or suggestion had been made that the Court would give him any lighter sentence or other consideration because of the guilty plea. The trial judge also noted that appellant stated: "I pleaded guilty because I am guilty. " [T.R. 64-65].

The trial judge concluded that appellant's guilty plea was free from misrepresentation "on the part of any person" and that "petitioner was adequately represented by competent counsel in the criminal proceedings. " [T.R. 67].

V

ARGUMENT

A. No Statements By The Prosecuting Attorney Violated Appellant's Constitutional Rights.

Appellant argues that the prosecuting attorney promised appellant's attorney a five-year sentence for appellant if he would plead guilty and 55 years if he would not plead guilty.

The record does not support this claim. The testimony received at the hearing of the motion in question is not part of the

record herein. 3/ However, appellant's brief quotes portions of the testimony which tend to refute his claim of promises and threats:

Attorney Kavanagh's testimony:

"I believe I indicated to Mr. Lynch that the average time was 5 years, but that the U. S. Attorney or the Court wouldn't commit themselves, and he could get the maximum." (Appellant's Brief, p. 28, emphasis added).

"I asked Mr. Enstrom what the average time on a plea such as this and I don't recall whether it was the average time for commitment, but as best I recall, Mr. Enstrom said 5 years is average." (Appellant's Brief, p. 24).

Appellant concedes that the latter statement is "the closest we can come" to an admission of the existence of the alleged five-year promise (Appellant's Brief, p. 24).

As appellant notes, there was a conflict in the evidence at the hearing. The trial court decided the issue against appellant after hearing the evidence. The trial court was not required to accept appellant's version of the events in question. Where the evidence is conflicting, a finding of fact by the trial court must be upheld upon appeal.

3/ Appellant states that he mailed transcripts of all proceedings to the Clerk of the Ninth Circuit Court of Appeals on July 23, 1965 (Appellant's Brief, p. VI), so a copy might be available to the Court. In any event, we have mailed a copy of the Transcript to the Clerk of the Court for the Court's perusal.

Wilson v. United States, 100 F.2d 552, at 555

(9th Cir. 1938).

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Federal Rules of Civil Procedure, Rule 52(a).

Findings of fact shall not be set aside unless "clearly erroneous."

United States v. Oregon Med. Soc. ,

343 U.S. 326, at 332 (1952);

Jensen v. United States, 326 F.2d 891, at 893

(9th Cir. 1964),

"This rule applies likewise to all reasonable inferences of the trial judge."

Hearn v. United States, 194 F.2d 647, at 649

(7th Cir. 1952), cert. denied,

343 U.S. 968 (1952).

An appellate court does not have time to retry the issues of fact whenever a litigant is disappointed by the decision in the trial court, nor does it have an opportunity to observe the demeanor of the witnesses, their tones of voice, and their gestures.

" 'Face to face with living witnesses the original trier of facts holds a position of advantage from which appellate judges are excluded How can we say the judge is wrong? We never saw the witnesses. . . . ' "

United States v. Oregon Med. Soc. , supra, 343 U.S.

326, at 339, quoting Boyd v. Boyd,

169 N. E. 632.

It has been stated that the " 'best and most accurate record' " upon appeal " 'is like a dehydrated peach. ' " A witness may be impeached by his own demeanor.

Broadcast Music v. Havana Madrid Restaurant Corp.,

175 F.2d 77, at 80 (2nd Cir. 1949).

Although the finding of fact may be set aside if clearly erroneous, there is no evidence before this Court providing an opportunity to study the evidentiary basis for the findings.

"No claim that a finding is not supported by the evidence can be sustained where, as herein, the evidence is omitted from the record on appeal. In such a case the trial court's findings are presumed to be supported by the evidence, Canal Bank v. Hudson, 111 U.S. 66, 81, 4 S.Ct. 303, 28 L.Ed. 354, and cannot be set aside, Federal Rules of Civil Procedure, Rule 52(a), 28 U.S.C.A. following section 723c. "

Griffiths Dairy v. Squire, 138 F.2d 758, at 760

(9th Cir. 1943).

"The record does not disclose that the defendants preserved all of the testimony of the witnesses, and since the findings of the court are based on evidence which is not in the record before us, we must accept the finding as correct. "

Carter Oil Co. v. Norman, 131 F.2d 451, at 456

(7th Cir. 1942) (The same rule appears in
Jensen, supra, at 893).

It does not appear, however, that appellant has been pre-judiced by his lack of knowledge of this rule, for his own brief clearly demonstrates that there was a conflict of evidence in the trial court (Appellant's Brief, pp. 21, 24, 28). Appellant merely asks this Court to disbelieve Attorney Kavanagh and to believe appellant.

Appellant had the burden of proof to establish his claim by a preponderance of the evidence.

Hearn v. United States, supra, 194 F.2d 647, at 649.

The trial court's finding that he failed to meet the burden of proof was not "clearly erroneous".

B. The Trial Court's Finding That Appellant
 Was Adequately Represented By Competent
 Counsel Should Be Upheld Upon Appeal.

Appellant contends that his representation by counsel was ineffective. The trial court found that appellant was adequately represented by competent counsel in the criminal proceedings [T.R. 67].

Here again, the finding of the trial court should not be set aside unless clearly erroneous.

United States v. Oregon Med. Soc., supra.

Here again, the evidence received at the hearing does not appear in the record, so the findings of fact are presumed to be

supported by the evidence.

Griffiths Dairy v. Squire, supra.

Furthermore, the facts contained in appellant's brief do not support a claim of ineffectiveness of counsel.

Appellant states that after the robbery officers were looking for a suspect clothed differently than appellant was clothed when arrested. This is not particularly important, as the robber might have decided to change clothes and remove sunglasses after the robbery.

Appellant contends that Attorney Steward told him that he could get appellant released upon search and seizure grounds, but appellant admits that Attorney Steward testified that he may have told appellant that a search and seizure question could properly be "raised" (Appellant's Brief, pp. 2, 36).

Appellant states that co-defendant Gallant, when he implicated appellant, was without counsel and possibly misled by the Federal Bureau of Investigation. There does not seem to be anything in the record supporting this claim.

Appellant states that Attorney Kavanagh told him that the prosecuting attorney informed him that a not guilty plea would not go well with the Court, that he would get only 5 years if he pleaded guilty, and that he would receive 55 years if convicted. However, appellant admits that Kavanagh wrote that he did not remember any specific statement by the United States Attorney and that the latter may have stated that the average sentence was 5 years (Appellant's Brief, p. 9).

The fact that Kavanagh may have conferred with the prosecuting attorney does not tend to establish that promises or threats were made. It is a normal procedure for defense counsel to attempt to seek interviews with prosecutors for the purpose of ascertaining the strength of the prosecution case. The fact that co-defendant Gallant may have heard something about 5 years and 55 years does not establish that threats or promises were made. Neither does the fact that Attorney Wiggins testified that he was surprised at the 10-year sentence establish that there was a promise of 5 years, for appellant concedes that Wiggins testified that he would not have been surprised at a 6-year sentence (Appellant's Brief, p. 16).

Appellant complains that Kavanagh made no independent investigation of the facts, although he was told that alleged eye-witnesses were not positive in their identification. However, appellant admits that Kavanagh looked at the United States Attorney's file, according to the testimony (Appellant's Brief, p. 21). Appellant also concedes that Kavanagh testified that appellant confessed his guilt to Kavanagh (Appellant's Brief, p. 29).

Appellant states that Kavanagh admitted that he tells every appointed defendant to plead guilty. However, this is a conclusion drawn by appellant from ambiguous testimony (Appellant's Brief, p. 39).

Although appellant's arguments are frivolous in the absence of any record of the testimony received at the time of the hearing in question, a number of his contentions have been discussed in

this brief in order to demonstrate that appellant, a layman, was not prejudiced by his lack of knowledge of appellate procedures. It is clear from his brief that his appeal has no merit because it merely involves disputed questions of fact resolved in the trial court.

VI

CONCLUSION

It is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

MANUEL L. REAL,
United States Attorney,

JOHN K. VAN DE KAMP,
Assistant U. S. Attorney,
Chief, Criminal Division,

J. BRIN SCHULMAN,
Assistant U. S. Attorney,
Assistant Chief, Criminal Division,

PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Phillip W. Johnson

PHILLIP W. JOHNSON

No. 20324

In the

**United States Court of Appeals
For the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CARPENTERS LOCAL NO. 2133, UNITED BROTHER-
HOOD OF CARPENTERS AND JOINERS OF AMERICA,
AFL-CIO; and SALEM BUILDING AND CONSTRUCTION
TRADES COUNCIL, AFL-CIO,
Respondents.

**On Petition for Enforcement of an Order
of the National Labor Relations Board**

RESPONDENTS' BRIEF

DONALD S. RICHARDSON,
GREEN, RICHARDSON & GRISWOLD,
1003 Corbett Building,
Portland, Oregon 97204,
Attorneys for Respondents.

FILED

DEC 3 1965

FRANK H. SCHMID, CLERK

INDEX

	PAGE
Jurisdiction	1
Statement of the Case	2
I. The Board's Findings of Fact	2
A. Interstate Commerce	2
B. Respondents did not request Ryan to sign a contract....	3
II. The Board's Conclusions and Order	4
Argument	5
I. The Board Improperly Exercised Jurisdiction	5
II. Finding of Violation of Section 8(b)(7)(C) of the Act Not Supported by Substantial Evidence	7
Conclusion	9
Certificate	10

INDEX OF AUTHORITIES

CASES

	PAGE
Calumet Contractors Association, 133 NLRB 512	8
Connecticut Board of State Labor Relations (Norwalk Motel Inn), 136 NLRB 1090, 1091	5
Connecticut Board of State Labor Relations (New Englander Motor Hotel), 136 NLRB 1092	5
Houston Building & Construction Trades Council, 136 NLRB 321	8
Smitley v. N.L.R.B., 327 F. 2d 351, 353	8
Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 95 L. ed. 456	7

STATUTE

National Labor Relations Act, as amended, 29 U.S.C., Section 151, et seq.	1
Section 8 (b) (7) (C)	2, 8, 9
Section 10 (e)	1

No. 20324

In the

**United States Court of Appeals
For the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

CARPENTERS LOCAL NO. 2133, UNITED BROTHER-
HOOD OF CARPENTERS AND JOINERS OF AMERICA,
AFL-CIO; and SALEM BUILDING AND CONSTRUCTION
TRADES COUNCIL, AFL-CIO,

Respondents.

**On Petition for Enforcement of an Order
of the National Labor Relations Board**

RESPONDENTS' BRIEF

JURISDICTION

This case is before the Court because of the Board's petition for enforcement of its order, issued against Respondents on April 1, 1965. The proceeding in this Court is based upon Section 10 (e) of the National Labor Relations Act, as amended (29 U.S.C., Sec. 151, et seq.). The respondent Labor Organizations contend that the Board improperly exercised jurisdiction under its standards.

STATEMENT OF THE CASE

I. The Board's Findings of Fact

The Respondents contend, first, that the Board improperly asserted its jurisdiction in this case, and, second, that the Board's Findings and Conclusions to the effect that the Respondents violated Section 8 (b) (7) (C) of the Act are not supported by substantial evidence. We consider it necessary that certain evidentiary matters, which the Board did not include in its statement of the case, but which support our position, be called to the Court's attention.

A. Interstate Commerce

The Board states that Leonard Ryan and Swept Wing Motel, Inc., constitute a single employer for jurisdictional purposes, and refers to the two, collectively, as "Ryan" (Board's Br., p. 3). While it is correct that Leonard Ryan testified that he is the sole owner of the corporation, it should be noted that he also testified that the corporation, Swept Wing Motel, Inc., was the employer of the employees engaged in the motel construction (Tr. 91). He also testified that he intends to continue to own and operate the motel (Tr. 86).

The Board found that Ryan had purchased \$54,788.91 worth of materials which had originated outside of Oregon, and the Board proceeded to assert jurisdiction

on the theory that its non-retail category should be applied and that there was an indirect inflow of material in excess of the value of \$50,000.00 annually. Respondents contend that the Board should have applied its retail category, which here would require a showing of probable annual volume of business of at least \$500,000.00 and certain other elements which we will discuss in our argument.

Of the \$54,788.91 worth of materials, about half of the total dollar amount represents furniture or furnishings for the motel. These include such items as lamps, chairs and tables, worth \$13,866.96 (GCX 2A-2D); 34 television sets worth \$3,910 (Tr. 20); furnishings and supplies worth \$4,586.20 (GDX 7), a carpet worth \$7,727 (Tr. 52), and the lobby furniture worth \$865.00 (Tr. 55). Respondents contend that all of these items should not have been counted if the Board's non-retail jurisdictional standard is to be used, because they are not construction materials, but, according to Mr. Krut-singer's testimony, are items normally supplied by the motel's owner (Tr. 130).

B. Respondents did not request Ryan to sign a contract.

We realize that the testimony is in conflict on this point, but we submit that the Trial Examiner and the Board should have credited the testimony of Mr. Krut-singer in this regard (Tr. 126), rather than that of Mr.

Ryan and Mr. Blair. Supporting Mr. Krutsinger's testimony is the concession by Mr. Ryan that no contract had ever been presented to him by Respondents (Tr. 93). Both Mr. Krutsinger and Mr. Westergard testified that if the employer had met the area standards for wages and fringe benefits, the picketing would have been terminated (Tr. 130-131, 135). Substantial differentials between the wage rates observed by the employer (Tr. 90-91) and the area wage rates referred to by Respondents (Tr. 127, 134) existed. Also, the employer provides no health and welfare or pension benefits (Tr. 91), while both the Carpenters' and the Laborers' area conditions include payments for health and welfare coverage and pensions (Tr. 127-128; Tr. 134-135).

II. The Board's Conclusions and Order

Respondents contend that the Board's order should not be enforced because

(1) The Board should not have asserted jurisdiction under its own standards, and

(2) The evidence does not support the Board's finding that the picketing was for the purpose of obtaining recognition from the employer.

ARGUMENT

I. The Board Improperly Exercised Jurisdiction

We realize that the minimum dollar amounts for inflow-outflow, or gross volume of business which the Board requires to be met before it asserts jurisdiction, are imposed by the Board, itself. However, we contend that, since the Board has adopted these standards, a substantial departure from the application of these standards by the Board is arbitrary and capricious.

While Mr. Ryan ordinarily is a home builder in the area of Salem, Oregon (Tr. 6), for the purposes of this case, we are concerned with his activities in connection with a motel at Albany, Oregon. This motel has been constructed through a wholly-owned corporation called "Swept Wing Motel, Inc." Since it appeared that Mr. Ryan is not engaged regularly in the motel construction business, but that he constructed this motel in order to continue to operate it, we contend that the appropriate jurisdictional standards would be the Board's retail category. This standard requires a gross annual volume of business of at least \$500,000, and is the standard used by the Board for hotels and motels (Connecticut Board of State Labor Relations (Norwalk Motel Inn) 136 NLRB 1090, 1091); (Connecticut Board of State Labor Relations (New Englander Motor Hotel), 136 NLRB

1092). Under this standard, as shown by the cases cited, it is also required that it be established that more than twenty-five per cent of the guests are "transients". In the present case, no evidence was offered with respect to the probable annual gross revenue or with respect to the probable conditions with respect to permanency of residents by potential guests.

Respondents also contend that, even under the non-retail jurisdictional standard, the Board should not have asserted jurisdiction. The reason for this is that we submit that all of the items which normally would be considered as furniture or furnishings of the motel should not have been included in computing the amount of inflow. If all of such items to which we have referred in our statement of the case are excluded, the dollar amount of inflow would be reduced by about one-half, and the \$50,000 minimum would not be met.

With respect to the assertion of jurisdiction, the Respondents contend simply that the Board should be consistent. This means that, first, since this is actually a motel operation, the retail standard should have been applied. However, if the non-retail standard is to be used, then certainly only the cost of those items normally used in construction and originating from outside the State of Oregon should have been counted.

II. Finding of Violation of Section 8 (b) (7) (C) of the Act Not Supported by Substantial Evidence.

The picketing involved in this case was done with a banner carrying a legend stating that Ryan was "non-union" and that there was no dispute with any other contractor. Prior to the picketing, Mr. Krutsinger had engaged in a conversation with Mr. Ryan at the job site, but Mr. Ryan did not claim that Mr. Krutsinger asked him to sign a contract at that time (Tr. 66-68). Subsequent to the commencement of picketing, all contacts were initiated either by Mr. Ryan or his representative, Mr. Blair. Mr. Krutsinger denied that he had asked Mr. Ryan to sign a contract (Tr. 126), and he also testified that had the employer observed area wage standards and fringe benefits, the picketing would have terminated (Tr. 130-131). Mr. Westergard also testified that in his conversation with Mr. Ryan and Mr. Blair he did not ask that a contract be signed (Tr. 133-134).

We submit that the factors above mentioned obviously detract from the weight of any evidence which would support the Board's findings and conclusions. We submit, therefore, that under the rule established by the Supreme Court in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 95 L. ed. 456, these matters must be taken into consideration. When taken into consideration, we contend that the entire record does not provide

substantial evidence to support the Board findings and conclusions.

We contend that here it was incumbent upon the General Counsel to prove that the Respondents were picketing for an immediate object of recognition or organization. As this Court has stated in *Smitley v. N.L.R.B.*, 327 F. 2d 351, 353,

“Unless picketing has as an object ‘recognition or organization,’ it is not prohibited by Section 8 (b) (7) (C) of the Act.”

In support of our contention that the Respondents were entitled to picket to publicize the fact that the employer did not observe area standards with respect to wage rates and fringe benefits, we rely upon the Board’s decisions in *Calumet Contractors Association*, 133 NLRB 512, and *Houston Building & Construction Trades Council*, 136 NLRB 321.

In *Calumet Contractors Association* (supra), 133 NLRB 512, the Board stated as follows:

“We hold that Respondent’s admitted objective to require the Association and DeJong to conform standards of employment to those prevailing in the area, is not tantamount to, nor does it have an objective of, recognition or bargaining. A union may legitimately be concerned that a particular employer is undermining area standards of employment by maintaining lower standards. It may be willing to forego recognition and bargaining provided subnor-

mal working conditions are eliminated from area considerations. We are of the opinion that Section 8(b)(4)(C) does not forbid such an objective.”

Since in the present case the Respondents never presented a contract to the employer, denied that they had asked him to sign one, and would have terminated the picketing had area standards for wages and fringe benefits been observed by the employer, we submit that the Board’s finding of a violation of Section 8 (b) (7) (C) is not supported by substantial evidence.

CONCLUSION

We respectfully submit that the Court should deny enforcement of the Board’s order.

DONALD S. RICHARDSON

GREEN, RICHARDSON & GRISWOLD

Attorneys for Respondents

CERTIFICATE

I certify that in connection with the preparation of this Brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing Brief is in full compliance with these rules.

DONALD S. RICHARDSON

Of Attorney for Respondents

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CARPENTERS LOCAL No. 2133, UNITED BROTHERHOOD
OF CARPENTERS AND JOINERS OF AMERICA, AFL-
CIO; and SALEM BUILDING AND CONSTRUCTION
TRADES COUNCIL, AFL-CIO, RESPONDENTS

**On Petition for Enforcement of an Order of the
National Labor Relations Board**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

GLEN M. BENDIXSEN,
Attorney,

National Labor Relations Board.

INDEX

	Page
Jurisdiction	1
Statement of the case	2
I. The Board's findings of fact	2
A. The employer's operations in interstate commerce	2
B. Respondents' request Ryan to sign a union contract, and when he refuses establish a picket line declaring he is nonunion.....	3
II. The Board's conclusions and order	8
Argument	9
I. The Board properly exercised jurisdiction in the proceeding	9
II. Substantial evidence supports the Board's finding that Respondents violated Section 8(b) (7) (C) of the Act	11
Conclusion	19
Certificate	19
Appendix A	20
Appendix B	25

AUTHORITIES CITED

Cases:

<i>American Federation of Grain Millers, Local 16 (Bartlett Co.)</i> , 141 NLRB 974	13
<i>Barker Bros. Corp. v. N.L.R.B.</i> , 328 F. 2d 431 (C.A. 9)	18
<i>Bon Hennings Loggings Co. v. N.L.R.B.</i> , 308 F. 2d 548 (C.A. 9)	9
<i>Dayton Typographical Union No. 57 v. N.L.R.B.</i> , 326 F. 2d 634 (C.A.D.C.)	12, 15
<i>Houston Building and Construction Trades Council (Claude Everett Construction Co.)</i> , 136 NLRB 321	11-12

Cases—Continued

Page

<i>International Hod Carriers, Building and Common Laborers' Union of America, Local No. 41, AFL-CIO (Calumet Contractors Association), 133 NLRB 512</i>	12
<i>Local 89, Chefs, Cooks, Pastry Cooks and Assistants Union of New York, a/w Hotel, Restaurant Employees and Bartenders Int'l Union, AFL-CIO, et al., etc., 154 NLRB No. 14 (59 LRRM 1725)</i>	18
<i>Local Union 429, IBEW (Sam M. Nelson), 138 NLRB 460</i>	18
<i>Local 445, Teamsters (Colony Liquior), 145 NLRB 263</i>	13
<i>Local 705, Teamsters v. N.L.R.B., 307 F. 2d 197 (C.A.D.C.)</i>	12, 15
<i>Local Union 714, Plumbing and Pipe Fitting Industry (Keith Riggs Plumbing and Heating Contractor), 137 NLRB 1125</i>	12, 16
<i>Local 1199, Drug and Hospital Employees' Union (Janet Sales), 136 NLRB 1564</i>	13
<i>McLeod v. Local 3, IBEW, 57 LRRM 2052 (D.C. N.Y.)</i>	13
<i>Memphis Moldings, Inc. v. N.L.R.B., 341 F. 2d 534 (C.A. 6)</i>	10
<i>N.L.R.B. v. Aurora City Lines, Inc., 299 F. 2d 229 (C.A. 7)</i>	9
<i>N.L.R.B. v. Burnett Construction Co., 350 F. 2d 57 (C.A. 10)</i>	10
<i>N.L.R.B. v. Hod Carriers' Building & General Laborers' Union of America, Local No. 652 AFL-CIO, (C.A. 9), No. 19708, decided September 27, 1965 (60 LRRM 2189)</i>	10
<i>N.L.R.B. v. International Union of Operating Engineers, Local 571, 317 F. 2d 638 (C.A. 8)</i>	10, 14
<i>N.L.R.B. v. Local Joint Executive Board, etc., 301 F. 2d 149 (C.A. 9)</i>	10
<i>N.L.R.B. v. Local 3, Intern. Bros. of Elec. Workers, 317 F. 2d 193 (C.A. 2), case, after remand, 339 F. 2d 600 (C.A. 2), en'g 144 NLRB 5</i>	18
<i>N.L.R.B. v. Local 182, Teamsters, 314 F. 2d 53 (C.A. 2)</i>	12, 13, 17

III

Cases—Continued

	Page
<i>N.L.R.B. v. Local 239, Teamsters</i> , 289 F. 2d 41 (C.A. 2), cert. denied, 368 U.S. 833.....	17-18
<i>N.L.R.B. v. Local 542, Operating Engineers</i> , 331 F. 2d 99 (C.A. 3)	18
<i>N.L.R.B. v. Monterey County Bldg. & Constr. Trade Council</i> , 335 F. 2d 927 (C.A. 9), cert. denied, 380 U.S. 913	13, 15
<i>N.L.R.B. v. Ozark Dam Constructors</i> , 190 F. 2d 222 (C.A. 8)	10
<i>N.L.R.B. v. Sapulpa Typographical Union No. 619</i> , 321 F. 2d 771 (C.A. 10)	15
<i>N.L.R.B. v. Stoller</i> , 207 F. 2d 305 (C.A. 9), cert. denied, 347 U.S. 919	9
<i>N.L.R.B. v. U.S. Divers Co.</i> , 308 F. 2d 899 (C.A. 9)	15
<i>N.L.R.B. v. Walton Mfg. Co.</i> , 369 U.S. 404.....	15
<i>N.L.R.B. v. West Side Carpet Cleaning Co.</i> , 329 F. 2d 758 (C.A. 6)	9
<i>Operative Plasterers' & Cement Masons, Int'l Assoc. Local Un. No. 44, AFL-CIO (Penny Const. Co., Inc.)</i> , 144 NLRB 1298.....	15
<i>Penello v. Retail Store Employees</i> , 188 F. Supp. 192, 199 (D.C. Md.), aff'd 287 F. 2d 509 (C.A. 4)	12
<i>Scobell Chemical Company v. N.L.R.B.</i> , 267 F. 2d 922 (C.A. 2)	14
<i>Siemons Mailing Service</i> , 122 NLRB 81	9
<i>Leonard Smitley, etc. d/b/a Crown Cafeteria v. N.L.R.B.</i> , 327 F. 2d 351 (C.A. 9)	19
<i>Sperry v. Lawrence Typographical Union No. 570</i> , 238 F. Supp. 498, 501 (Kansas)	13
<i>Universal Camera Corp. v. N.L.R.B.</i> , 340 U.S. 474..	13

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, <i>et seq.</i>)	1
Section 8 (b) (7)	2, 11
Section 8 (b) (7) (C)	2, 11
Section 9 (c)	8
Section 10 (1)	8
Section 10 (e)	1

**In the United States Court of Appeals
for the Ninth Circuit**

No. 20324

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CARPENTERS LOCAL NO. 2133, UNITED BROTHERHOOD
OF CARPENTERS AND JOINERS OF AMERICA, AFL-
CIO; and SALEM BUILDING AND CONSTRUCTION
TRADES COUNCIL, AFL-CIO, RESPONDENTS

**On Petition for Enforcement of an Order of the
National Labor Relations Board**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

JURISDICTION

This case is before the Court upon the petition of the Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*),¹ for enforce-

¹ Pertinent provisions of the Act are set forth *infra*, pp. 20-24.

ment of its order, issued against respondents on April 1, 1965 (R. 17-25, 35-36),² and reported at 151 NLRB No. 133. This Court has jurisdiction of the proceedings, the unfair labor practices having occurred in Albany, Oregon, within this judicial circuit. The issue of whether the Board properly exercised jurisdiction in the proceeding is discussed *infra*, pp. 9-10.

STATEMENT OF THE CASE

I. The Board's Findings of Fact

The Board found that respondents violated Section 8(b)(7)(C) of the Act by picketing an employer with an object of forcing or requiring him to recognize and bargain with respondents as the collective bargaining representative of his employees, without filing a petition for a Board election under Section 9(c) of the Act within a reasonable period of time from the commencement of the picketing. The evidence upon which the Board based its finding is summarized below.

A. *The employer's operations in interstate commerce*

Leonard V. Ryan, for more than 9 years, has constructed residential and other dwellings in Salem,

² References designated "R." are to Volume I of the record as reproduced pursuant to Rule 10 of this Court. References designated "Tr." are to the reporter's transcript of testimony as reproduced in Volume II of the record. "GCX." refers to the General Counsel's exhibits. Whenever in a series of references a semicolon appears, those preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

Oregon, under the name of Leonard Ryan, Builder. Ryan also owns all the stock and manages and controls Swept Wing Motel, Inc., an Oregon corporation. It is not disputed that Leonard Ryan, Builder and Swept Wing constitute a single employer under the Act for jurisdictional purposes, and they are hereafter referred to collectively as "Ryan" (R. 17; Tr. 6, 7-8).

In January 1964³ Ryan began construction of 34 units of a motel on a ten acre tract he owns in Albany, Oregon. He planned to complete construction of the 34 units by April 15, and to finish an additional 32 units and a restaurant by June 15 (R. 18-19; Tr. 8, 12).

At the time of the hearing in the instant case (May 27), in the construction and furnishing of the 34 units of the motel Ryan had purchased \$54,788.91 worth of materials which were shipped into Oregon from out-of-state sources (R. 18, 35 n. 1; Tr. 9-57, 79-84, GCX 2A-2D, 3, 4A-4B, 5A-5B, 6A-6B, 7, 8A-8C, 9, 10).

B. Respondents request Ryan to sign a union contract, and when he refuses establish a picket line declaring he is nonunion

To build the basic structure for the motel, Ryan employed nonunion carpenters and laborers who had previously worked for him in Salem. He engaged three subcontractors who were union to do the plumbing, plastering and electrical work. In addition, he

³ All dates hereafter refer to 1964 unless otherwise indicated.

engaged several other subcontractors whom he regularly used in Salem and who were nonunion (R. 19; Tr. 7, 12, 58-62).

Respondent Carpenters is a constituent member of respondent Council. Early in January, shortly after construction started, Carpenters' business representative and financial secretary, Carl Krutsinger, came to the job site and asked Ryan how he was going to "handle the job." Ryan replied that he had built houses in Salem for several years with various non-union carpenters and both union and nonunion subcontractors, and that he planned to use the same employees and subcontractors in Albany (R. 19; Tr. 66-68).

Ryan heard nothing more from any of respondents' representatives until February 12. On that date a picket appeared at the jobsite bearing a sign with the following legend (R. 19 n. 9; Tr. 64-65, 68, 123-124):

RYAN
is doing this work
NON-UNION
No dispute with
Any other Contr.
BLDG. TRADES CCL SALEM

The picketing was authorized and was carried on in the name of the Council upon the request of the Carpenters and other constituent members of the Council (R. 19; Tr. 131-132).

The two employees working for the union plumbing subcontractor immediately walked off the job.

Before doing so, they asked Ryan to see about "getting the picket taken off so that they could go back to work" (R. 19; Tr. 68-69, 103-104).

About a week later, Ryan went to the Labor Temple in Salem and told Charles Westergard, Council secretary, that he had built houses in Salem for nine years, and that though the home building business in Salem was nonunion he had often used union subcontractors. Ryan told Westergard he would like to use the same men and subcontractors in Albany. Westergard stated that he understood the problem, and would see what he could do about removing the picket (R. 19; Tr. 70).

As the picketing continued, Ryan tried, without success, to call Westergard. After a week passed, Ryan again went to Westergard's office. Westergard was not there. However, Ryan was told that no decision had been reached about the picketing, but that there was to be a meeting at noon the next day, in Albany, between Carpenters' Representative Krutsinger and the secretary of the Painters' local. Ryan agreed to meet with them at the Albany jobsite (R. 20; Tr. 71).

The next day, February 26, Ryan met the representative of the Painters' local at the jobsite, but Krutsinger did not appear (R. 20; Tr. 71-72).

Later that day, Ryan went to the Carpenters' offices and asked Krutsinger what he wanted him "to do." Krutsinger replied that he wanted Ryan "to sign a contract." Ryan reiterated his generally non-union operations in Salem. Krutsinger then stated

that he would let Ryan sign a "short form contract." Ryan replied that he did not see how this "would help." Krutsinger said that perhaps Ryan could "sign a contract in Albany and not in Salem." Ryan answered that he did not think this would help either. Krutsinger finally stated that he was going to a Council meeting that night in Salem, and that he would talk to Secretary Westergard. He told Ryan that in the event they permitted the job to proceed, the work on the additional 32 motel units and the restaurant "would have to be union" (R. 20; 72-73).

A few days later, about March 1, Ryan consulted Alfred P. Blair, manager of the Cascade Employers Association, Inc., of which Ryan is a member. Blair called the Carpenters and talked to Krutsinger while Ryan listened on an extension. Blair asked Krutsinger what he wanted Ryan to do at the motel job-site in Albany. Krutsinger stated that he could not turn his back on the job and that he wanted Ryan "to sign a contract." Blair replied that the building business in Salem operated under nonunion conditions, that Ryan had to compete on that basis, and that therefore he could not sign a contract since he could not "be union" in Albany and "not" in Salem. Krutsinger replied that Ryan would have "to sign a union contract in order to get rid of the picket" and in order to use the "union subcontractors" he wanted on the job ⁴ (R. 20; Tr. 75-78, 111-115).

⁴ Krutsinger denied that he demanded that Ryan sign a union contract, either on February 26 or on March 1. The Trial Examiner, however, for reasons stated in his Decision,

The next day, about March 1, Blair called the Council and asked Westergard if he had reviewed allowing Ryan's union subcontractors to perform their work. Westergard said he was going to discuss the matter with the whole Council at the first of the week. Blair asked to be notified promptly of the Council's decision, but Blair did not hear anything further from Westergard (R. 20; Tr. 117-117).

Shortly thereafter Ryan notified Clarence Bishop, a union subcontractor, that Bishop would have to begin the electrical work or Ryan would be compelled to hire a nonunion subcontractor. Bishop said he could not work on the job while the picket was there. Bishop then called Jack Schiller, the business agent of the Electrical Workers' local in Salem, and spoke to him in Ryan's presence. Bishop told Schiller what Ryan had said, and tried to persuade him to try to get the Council to remove the picket so that Bishop's electricians could start work. Schiller then spoke to Ryan. Schiller told Ryan (referring to Ryan's threat to replace Bishop with a nonunion electrical subcontractor), "You wouldn't do that to me, would you?" The discussion between the three men ended with Bishop saying he could not start the electrical work for Ryan because there was no hope of the picket leaving (R. 21; 107-108).

Since the electrical subcontractor could not send his men across the picket line and the employees of the plumbing subcontractor had left the job when the

credited the testimony of Ryan and Blair over Krutsinger's denial (R. 20 ns. 10-11).

picketing commenced, Ryan engaged nonunion subcontractors to replace them (R. 21; Tr. 118-119, 103-106, 108-109). Thereafter, Association Manager Blair, on Ryan's behalf, tried to persuade the business agent of the Plasterers' local to let the plastering subcontractor begin his work, but the agent refused to let the plasterers cross the picket line (R. 21; Tr. 109, 119-122).

As shown, the picketing had commenced on February 12. An unfair labor practice charge having been filed and a complaint having been issued against respondents, the Board's Regional Director sought interim relief in the federal district court, pursuant to Section 10(1) of the Act. On April 22 the district court in Oregon enjoined the picketing pending the Board's final decision. It is thus conceded that the picketing was conducted for more than 30 days without the filing of an election petition under Section 9(c) of the Act (R. 6, 14, 21 n. 12). Because of the picketing and the resultant interruption of the plumbing, electrical, plastering and other work, Ryan's construction on the original 34 motel units was not yet fully completed at the time of the hearing on May 27 (R. 19 n. 8, 21; Tr. 60, 69, 98, 109).

II. The Board's Conclusions and Order

On the basis of the foregoing, the Board found that a purpose of respondents' picketing was to force or require Ryan to recognize and bargain with respondent Carpenters, although it was not the certified representative of Ryan's employees at any time during

the picketing. The Board concluded that since respondents continued their recognitional picketing for more than 30 days without filing an election petition as required by Section 8(b)(7)(C), respondents by their conduct violated that section of the Act (R. 21-23, 35).

The Board's order requires respondents to cease and desist from the unfair labor practices found, and to post appropriate notices (R. 23-25, 35-36).

ARGUMENT

I. The Board Properly Exercised Jurisdiction in the Proceeding

As shown *supra*, pp. 2-3, to construct and to furnish the initial 34 units of the motel at the Albany jobsite, Ryan purchased \$54,788.91 worth of goods originating from out-of-state. That this substantial shipment of goods in interstate commerce establishes the Board's statutory jurisdiction in the instant case, is manifest. *N.L.R.B. v. Stoller*, 207 F. 2d 305, 307 (C.A. 9), cert. denied, 347 U.S. 919; *N.L.R.B. v. Aurora City Lines*, 299 F. 2d 229, 231 (C.A. 7); *N.L.R.B. v. West Side Carpet Co.*, 329 F. 2d 758, 760 (C.A. 6).

Moreover, Ryan's operations satisfy the Board's self-imposed and discretionary jurisdictional standard for non-retail enterprises; while engaged in building the 34 motel units, he made interstate purchases for their construction and furnishing whose value exceeded \$50,000. *Siemons Mailing Service*, 122 NLRB 81, 85; *Bon Hennings Co. v. N.L.R.B.*, 308 F. 2d 548,

550-551 (C.A. 9). See also, *N.L.R.B. v. International Union of Operating Engineers, Local 571*, 317 F. 2d 638, 643 n. 5 (C.A. 8); *N.L.R.B. v. Ozark Dam Constructors*, 190 F. 2d 222, 226-228 (C.A. 8). Before the Board respondents asserted that since Ryan intended to continue to own and to operate the motel, the Board should apply its appropriate *retail* jurisdictional standard (i.e., gross annual revenue in excess of \$500,000 and more than 25 per cent transient guests), and accordingly should refuse to exercise jurisdiction. However, as the Trial Examiner noted (R. 18) the applicability of the Board's non-retail standard is self-evident, as during the events involved herein Ryan was engaged solely in his capacity as a builder of the motel, which was not yet even in operation. See, *N.L.R.B. v. Burnett Construction Co.*, 350 F. 2d 57, 59-60 (C.A. 10).

In short, in the instant case the Board, whose statutory jurisdiction over Ryan's operations is undisputed, clearly did not abuse the wide discretion it possesses in applying its self-imposed jurisdictional standards. *N.L.R.B. v. Local Joint Executive Board, etc.*, 301 F. 2d 149, 151-153 (C.A. 9), and decision of this Court there quoted; *N.L.R.B. v. Hod Carriers', Building & General Laborers' Union of America, Local No. 652 AFL-CIO*, (C.A. 9) No. 19708, decided September 27, 1965 (60 LRRM 2189, 2191); *Memphis Moldings, Inc. v. N.L.R.B.*, 341 F. 2d 534 (C.A. 6), and cases cited.

II. Substantial Evidence Supports the Board's Finding That Respondents Violated Section 8(b)(7)(C) of the Act

Section 8(b)(7)(C) of the Act (see, *infra*, pp. 20-21) prohibits a union that is not currently certified as the representative of an employer's employees from picketing that employer for recognition or organizational purposes for more than a reasonable time, not to exceed 30 days, unless a petition for an election is filed during that period. It is undisputed that respondent Carpenters was never certified as the representative of Ryan's employees, that respondents' picketing was carried on for more than 30 days, and that no representation petition was filed within that period. Thus, the sole question presented is whether an object of respondents' picketing was recognition and bargaining, as the Board found; or whether, as respondents contended, the sole object of their picketing was to publicize Ryan's failure to conform to area wage standards.

Section 8(b)(7) does not ban all picketing, but only picketing which has an object of recognition or organization. In the Board's view, picketing by a union to induce an employer to raise wage rates to the scale prevailing in the area need not be equated with an objective of recognition or organization. The Board has recognized that a union may legitimately be concerned that a particular employer is undermining area standards of employment by maintaining lower standards, and that the union may be willing to forego recognition to eliminate such substandard conditions. See, relied on by respondents, *Houston*

Building and Construction Trades Council (Claude Everett Construction Co.), 136 NLRB 321, 322-323; *International Hod Carriers, Building and Common Laborers' Union of America, Local No. 41, AFL-CIO (Calumet Contractors Association)*, 133 NLRB 512, 513. As the Board stated in *Houston, supra*, (136 NLRB at 323):

[The Union's] admitted objective to require the Association . . . to conform to standards of employment to those prevailing in the area, is not tantamount to, nor does it have an objective of recognition or bargaining. A union may legitimately be concerned that a particular employer is undermining area wage standards of employment by maintaining lower standards. It may be willing to forego recognition and bargaining provided subnormal working conditions are eliminated from area considerations.

Accord: *Local Union 714, Plumbing and Pipe Fitting Industry (Keith Riggs Plumbing and Heating Contractor)*, 137 NLRB 1125, 1125-1126. And see, *N.L.R.B. v. Local 182, Teamsters*, 314 F. 2d 53, 59 n. 3 (C.A. 2). However, since Section 8(b)(7) uses the phrase "an object," so long as one of the Union's objectives is illegal, it is immaterial that it might also have other legitimate objectives. *N.L.R.B. v. Local 182, Teamsters, supra*, 314 F. 2d at 58-59. *Penello v. Retail Store Employees*, 188 F. Supp. 192, 199 (D.C. Md.), aff'd 287 F. 2d 509 (C.A. 4); *Local 705, Teamsters v. N.L.R.B.*, 307 F. 2d 197, 198 (C.A.D.C.); *Dayton Typographical Union No. 57 v. N.L.R.B.*, 326 F. 2d 634, 639-645 (C.A. D.C.). The

question of whether a forbidden objective exists is one of fact (*Local 182, supra*, 314 F. 2d at 58-59 n. 2) and, we submit, the Board's finding that such objective did exist in this case is supported by substantial evidence on the record as a whole. It is, accordingly, entitled to stand. *N.L.R.B. v. Monterey County Building & Construction Trades Council*, 335 F. 2d 927, 931 (C.A. 9), cert. denied 380 U.S. 913, enforcing 142 NLRB 139; *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474.

As shown in the Statement, *supra*, pp. 3-8, Carpenters' Representative Krutsinger appeared at the Albany jobsite and was apprised by Ryan that, as he did in Salem, Ryan intended to use his nonunion employees and subcontract work to both union and nonunion subcontractors. As a result, respondents commenced picketing, with signs which made no reference to area wage standards, but simply bore the legend "Non-union". As stated in *McLeod v. Local 3, IBEW*, 57 LRRM 2052, 2057 (D.C. N.Y.), ". . . why have the only legend on the sign read that the employees are not members of the union if that end is not one of the objectives of the picketing?" Accord: *Sperry v. Lawrence Typographical Union No. 570*, 238 F. Supp. 498, 501 (Kansas); *American Federation of Grain Millers, Local 16 (Bartlett Co.)*, 141 NLRB 974, 979; *Drug and Hospital Employees' Union (Janet Sales)*, 136 NLRB 1564, 1568; *Local 445, Teamsters (Colony Liquor)* 145 NLRB 263, 266-267. Moreover, when Ryan confronted Krutsinger and asked what was necessary to remove the picket line, over Ryan's protestation that he was allowed to oper-

ate nonunion in Salem Krutsinger adamantly insisted that Ryan must "sign a union contract." Furthermore, Krutsinger indicated that even if respondents permitted work on the 34 units to resume by removing the picket line, Ryan "would have to be union" when he began construction of the restaurant and additional 32 units. Krutsinger reiterated that a union contract was a condition of removing the picketing when Blair, manager of the employer association of which Ryan was a member, asked Krutsinger what it would take "to get rid of the picket." In short, by their own declarations respondents revealed that the picketing was aimed at putting Ryan into the ranks of "union" contractors. Moreover, respondents' demand for a union contract necessarily implied bargaining and recognition. *Scobell Chemical Co. v. N.L.R.B.*, 267 F. 2d 922, 925 (C.A. 2), and cases cited; *N.L.R.B. v. International Union of Operating Engineers, Local 571*, *supra*, 317 F. 2d at 641-642.

During the weeks of picketing that followed, Ryan, along with Association Manager Blair, made several attempts to persuade respondents' officials to remove the picketing. Declarations that they were considering the matter and failures to return promised telephone calls and to appear at scheduled meetings, constituted respondents' sole reaction.⁵ Thus, for over 2

⁵ Respondents offered no reason, and we know of none, why their declarations showing that the picketing was for a recognition objective should be discounted because they were uttered in discussions which were all initiated by Ryan or Blair speaking on his behalf. Respondents, therefore, have provided no basis for their attack on the Board's refusal (R. 22 n. 14) to attach any significance to the fact that but for

months, without filing an election petition to establish respondent Carpenters' representative status, respondents maintained a picket line for the manifest purpose of forcing Ryan to recognize and bargain with the Carpenters as the representative of Ryan's employees. The Board, therefore, properly concluded that respondents violated Section 8(b)(7)(C) of the Act. *N.L.R.B. v. Monterey County Building & Construction Trades Council, supra*; *Local 705, Teamsters v. N.L.R.B., supra*; *Dayton Typographical Union No. 57 v. N.L.R.B., supra*; *N.L.R.B. v. Sapulpa Typographical Union No. 619*, 321 F. 2d 771, 774 (C.A. 10).

The Board had ample warrant for rejecting respondents' defenses. Thus, the Trial Examiner's refusal to credit Krutsinger's denials that he conditioned the removal of the picket line on Ryan's entering into a union contract (see *supra*, p. 6 n. 4) merely raises an issue of credibility. Such issues, as this Court has recognized, are for determination by the trier of fact. *N.L.R.B. v. U.S. Divers Co.*, 308 F. 2d 899, 905 (C.A. 9). Accord: *N.L.R.B. v. Walton Mfg. Co.*, 369 U.S. 404, 407-408.

Ryan or Blair coming to them, respondents would have remained silent after establishing the picket line. As the Board said of a similar contention in *Operative Plasterers' & Cement Masons' International Association, Local Union No. 44, AFL-CIO (Penny Construction Company, Inc.)*, 144 NLRB 1298, 1300 n. 2, petition for enforcement dismissed on unrelated grounds, unreported order of court, No. 7701 (C.A. 10), November 27, 1964: "We fail to understand why an employer who is being picketed by a labor organization may not inquire from the representative of that labor organization as to the object of the picketing."

The record totally refutes respondents' insistence that they, nonetheless, picketed with the sole object of inducing Ryan to conform with area wage standards. As noted by the Board (R. 21), it is conceded that before the picket line was established none of respondents' officials asked Ryan what wages or other benefits his employees received. Nor does the record show that respondents knew or were ever disturbed about such factors (R. 21; 90-91, 97-98, 131, 135-136). The sole object of respondents' concern was Ryan's use of "non-union" employees and subcontractors.

Cases relied on by respondents (*supra*, pp. 11-12) do not support their defense. In each case the evidence established that the union's current objective was not recognition or bargaining, but conformity with area wage standards. Thus, in *Houston*, the union's picket signs protested the "substandard wages and conditions being paid by the employer," and the union had repeatedly protested "against substandard wages . . . without ever requesting recognition as . . . bargaining representative." (136 NLRB at 322-323). In *Calumet*, the unions "clearly disclaimed an objective [of recognition and bargaining] and sought only to eliminate subnormal working conditions from area considerations." (133 NLRB at 513). See also, *Local Union No. 741, etc., supra*, 137 NLRB at 1126. As shown, far from demonstrating an overweening concern over Ryan's alleged failure to meet working conditions prevailing in the area, respondents displayed no concern whatsoever. The evidence showing a recognitional purpose is, therefore, unrebutted. In

sum, here as in *N.L.R.B. v. Local 182, Teamsters*, *supra*, 314 F. 2d at 59 n. 3, there is no proof "to support a finding that the union has a genuine interest in compelling the improvement of the labor conditions or eliminating the competition, even though the union does not become the bargaining representative."

Finally, the Union's picketing was not protected by the second proviso to Section 8(b)(7)(C) (see *infra*, p. 21), which privileges recognitional picketing where that picketing merely truthfully advises the public that an employer does not employ members of, or have a contract with, a union, unless an effect of such picketing is to halt pickups or deliveries, or the performance of services. The picket line immediately induced the union employees of Ryan's plumbing subcontractor to cease working. As respondents' rejected Ryan's repeated requests to remove the picket line, he finally resorted to engaging a different and nonunion subcontractor to install the plumbing. The delay caused by this, and by the refusal of other locals to grant the electrical and plastering subcontractors permission to start work with their union employees as long as the picketing continued, had already resulted in delaying Ryan's completion of the 34 motel units for almost 6 weeks at the time of the hearing. Accordingly, the proviso to Section 8(b)(7)(C) does not exempt respondents' picketing since it caused work stoppages which in fact interfered with and disrupted Ryan's operations. *N.L.R.B. v. Local 239, Teamsters*, 289 F. 2d 41, 45

(C.A. 2), cert. denied, 368 U.S. 833; *N.L.R.B. v. Local 542, Operating Engineers*, 331 F. 2d 99, 104 (C.A. 3); *Local Union 429, IBEW (Sam M. Nelson)*, 138 NLRB 460, 463. Accord: *Barker Brothers Corp. v. N.L.R.B.*, 328 F. 2d 431, 434-437 (C.A. 9).

Moreover, respondents' entire course of conduct belies their assertion that their picketing was aimed solely at advising the public within the meaning of the proviso. As shown, other local unions refused the requests of Ryan's union subcontractors (plumbing, electrical, and plasterer) to allow them to work behind the picket line. Both of respondents' representatives (Krutsinger and Westergard) indicated to Ryan that the only way those union subcontractors could perform their work was if Ryan took the action respondents' demanded and thereby got "rid of the picketing" (*supra*, pp. 6-7). As the Trial Examiner concluded (R. 22-23) the above facts demonstrate that respondents aimed the picketing, successfully, at the other local unions to bring about their cooperative action, and that the picket line at the jobsite was not established merely to advise the public of Ryan's non-union status. See, *N.L.R.B. v. Local 3, International Brotherhood of Electrical Workers, AFL-CIO (Jack Picoult)*, 317 F. 2d 193, 197-200, (C.A. 2); same case, after remand, 339 F. 2d 600, enforcing 144 NLRB 5; *Local 89, Chefs, Cooks, Pastry Cooks and Assistants Union of New York, a/w Hotel, Restaurant Employees and Bartenders International Union, AFL-CIO, et al. (Cafe Renaissance, Inc.)*, 154 NLRB No. 14 (59 LRRM 1725). See also, *Leonard Smitley*,

etc., d/b/a Crown Cafeteria v. N.L.R.B., 327 F. 2d 351 (C.A. 9).

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

GLEN M. BENDIXSEN,
Attorney,

National Labor Relations Board.

November 1965.

CERTIFICATE

The undersigned certifies that he has read the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

* * * *

UNFAIR LABOR PRACTICES

* * * *

[Sec. 8] (b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees: (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9 (c) of this Act, (B) where within the preceding twelve months a valid election under section 9 (c) of this Act has been conducted, or (C) where such picketing has been conducted without a petition under section 9 (c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9 (c)

(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services. Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8 (b).

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or

agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his charge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon.

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order; and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the

court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

* * * *

(1) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8 (b), or section 8(e), or section 8(b) (7), the preliminary investigation of such charge shall be made forth-

with and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: * * * Provided further, That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed, and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. * * *

APPENDIX B

PURSUANT TO RULE 18(f) OF THE RULES OF
THE COURT

GENERAL COUNSEL'S EXHIBITS

<u>No.</u>	<u>Identified</u>	<u>Received in Evidence</u>
1-A to 1-H	5	5
2A to 2D	10	13
3	14	15
4-A to 4-B	15	17
5-A to 5-B	17	18
6-A to 6-B	23	29
7	41	43
8-A to 8-C	46	48
9	52	55
10	80	83

No. 20,323

United States Court of Appeals
For the Ninth Circuit

HARTFORD FIRE INSURANCE COMPANY, a corporation, vs. O. T. JONES and RUBY I. JONES,	<i>Appellant,</i> <i>Appellees.</i>
-----------------------------------------------------------------------------------------------------	--------------------------------------------------------

APPELLANT'S OPENING BRIEF

AUGUSTUS CASTRO,
333 Montgomery Street,
San Francisco, California 94104,

MERRILL & MERRILL,
Spaulding Building,
Pocatello, Idaho,

Attorneys for Appellant.

FILED

DEC - 3 1965

FRANK H. SCHMID, CLERK

Subject Index

	Page
Statement of pleadings	1
I. Jurisdiction of the court	1
II. Pleadings	2
A. Complaint in declaratory relief	2
B. Answer	4
C. Cross-complaint	4
D. Answer to cross-complaint	4
Statement of the case	5
Specifications of error	11
I. Granting appellees' motion for a directed verdict on the issue of liability and refusing to submit to the jury the defenses of an incendiary fire and conspiracy to defraud appellant by setting the fire and by filing a false proof of loss (288, 293)	11
II. Refusing appellant's claim of surprise as to the testi- mony of Betty Oldham; refusing to allow appellant to cross-examine her concerning her earlier state- ments; refusing to admit her written statement, and refusing to allow testimony of prior inconsistent statements	12
Summary of argument	18
Argument	20
I. Idaho rule of law applicable	20
A. Idaho rules on motions for directed verdicts	20
B. Fraud, conspiracy to defraud by an incendiary fire or false proof of loss are provable by circum- stantial evidence	23
1. Incendiary fire	23
2. Fraud	24
II. Evidence was legally sufficient to establish incendiary fire	26
A. Description of building	26
B. Point of origin of each fire was in the area of the stove located in the kitchen	27

	Page
C. Finding of a criminal agent at point of origin as evidence of incendiary fire	27
1. Presence of criminal agent at scene	27
2. Existence of several unconnected fires	28
D. Evidence of use of liquid inflammables to cause fire found at point of origin and throughout Units 1 and 4	29
E. Evidence of four separate fires	29
F. Uncontradicted expert opinion was that this was a fire of incendiary origin	30
III. Evidence was legally sufficient to establish that appellees wilfully caused this fire	30
A. Appellees had the opportunity to set the fire	31
B. No one had access to the motel but appellees	33
C. Appellees had a financial motive to set this fire	34
D. Conduct of appellees following the loss was such that the jury could infer their connection with this fire	36
IV. Appellant's claim of surprise was proper and it was error for the trial court to exclude evidence of the witness's earlier inconsistent statements	37
A. Introduction	37
B. Idaho law allows impeachment of a party's own witness	41
C. Under federal decisional law a party may impeach his own witness upon a claim of surprise	43
V. The trial court erred in refusing to admit into evidence plaintiff's Exhibit No. 10, as it was properly admissible as a record of past recollection	47
Conclusion	53

Table of Authorities Cited

Cases	Pages
Albrethson v. Carey Valley Reservoir Co. (1947), 67 Idaho 529, 186 P.2d 853.....	53
American Home Assurance Co. v. Essy (1960), 179 C.A.2d 19, 24	34
Asaro v. Parisi (1st Cir. 1962), 297 F.2d 859, 863.....	51
Batchelor v. Finn (1959), 169 C.A.2d 410, 341 P.2d 803....	25
Bieber v. United States (9th Cir. 1960), 276 F.2d 709.....	43, 44
Breidenthal v. Breidenthal (1957), 182 Kan. 23, 318 P.2d 981	25
British America Assur. Co. v. Bowen (10th Cir. 1943), 134 F.2d 256	28, 31, 34
Buffat v. Schnuckle (1957), 79 Idaho 314, 316 P.2d 887....	21
Carpenter v. Union Insurance Society of Canton, Ltd. (4th Cir. 1960), 284 F.2d 155.....	30
Conklin v. Patterson (1963), 85 Idaho 331, 379 P.2d 428, 430	20
Dandini v. Dandini (1953), 120 C.A.2d 211, 260 P.2d 1033	25
Debardeleben v. United States (9th Cir. 1962), 307 F.2d 362	43
Erie Railroad Co. v. Tompkins (1938), 304 U.S. 64.....	20
Ettelson v. Metropolitan Life Ins. Co. (3rd Cir. 1947), 164 F.2d 660, 667.....	52
Franklin v. Wooters (1935), 55 Idaho 619, 45 P.2d 804....	42
Gencarella v. Fyfe (1st Cir. 1948), 171 F.2d 419.....	53
Grimes v. State, 79 Ga. App. 489, 54 S.E.2d 302.....	27
Hyland v. Miller Nat. Ins. Co. (9th Cir. 1947), 91 F.2d 735, 737	20
Jaeger v. Hackert (1950, Iowa), 41 N.S.2d 42, 45.....	52
Journeymen Plasterers, et al. v. N.L.R.B. (7th Cir. 1965), 341 F.2d 539	43
Kinsey v. State (1937), 65 P.2d 1141.....	49

	Pages
McCormick and Co. v. Tolmie (1926), 42 Idaho 1, 6, 243 Pac. 355, 357	20
McIntosh v. Eagle Fire Company of New York (4th Cir. 1963), 325 F.2d 99.....	25
Nathan v. St. Paul Mutual Insurance Co., 86 N.W.2d 503..	33
O'Briant v. State (1956), 72 Nev. 100, 295 P.2d 396, 397..	24, 27, 28
O'Shea v. Jewel Tea Co. (7th Cir. 1956), 233 F.2d 530....	21, 43
Palmer v. Hoffman (1943), 318 U.S. 109.....	20
Penn Mut. Life Ins. Co. v. Ireton (1937), 57 Idaho 466, 65 P.2d 1032, 1039	24
People v. Becker (1949), 94 C.A.2d 434, 210 P.2d 871.....	33
People v. Freeman (1955), 209 C.A.2d 11, 15, 286 P.2d 565	24, 30, 31, 34
People v. Furgerson (1962), 209 C.A.2d 387, 25 Cal.Rptr. 818	36
People v. Gilyard (1933), 134 Cal.App. 184, 189, 25 P.2d 35	27
People v. Hays (1950), 101 C.A.2d 305, 311, 225 P.2d 600	24, 28, 30, 31, 34
People v. Kasparoff (1928), 94 Cal.App. 7, 270 P. 398.....	27
People v. Kessler (1944), 62 C.A.2d 817, 145 P.2d 656.....	31, 34
People v. Miller (1940), 41 C.A.2d 252, 106 P.2d 239.....	24
People v. Richard (1951), 101 C.A.2d 631, 637, 225 P.2d 938	34, 35
People v. Sherman (1950), 97 C.A.2d 245, 249, 217 P.2d 715	28
Putnam v. Moore (5th Cir. 1941), 119 F.2d 246.....	51
Saunders v. Visser (1944), 20 Wash.2d 58, 145 P.2d 898....	25
Smith v. Big Lost River Irrigation District (1961), 83 Idaho 374, 364 P.2d 146	21
State v. Gee (1930), 48 Idaho 688, 284 P.2d 845.....	42
State v. Gore (1940), 152 Kan. 551, 106 P.2d 704.....	24
State v. Gross (1948), 196 P.2d 297, 304.....	52
State v. Molitor (1955), 205 Oregon 698, 289 P.2d 1090....	24
State v. Turner (1961), 58 Wash.2d 159, 361 P.2d 581.....	24
State v. Van Bogart (1958), 85 Ariz. 63, 331 P.2d 597.....	24
Stevens v. United States (9th Cir. 1958), 256 F.2d 619....	43, 45

TABLE OF AUTHORITIES CITED

v

	Pages
Treadwell v. Nickel (1924), 194 Cal. 243, 260, 228 P. 25....	25
United States v. Allied Stevedoring Corp. (2d Cir. 1957), 241 F.2d 925	52
United States v. Kahaner (2d Cir. 1963), 317 F.2d 459....	43
United States v. Maggio (3d Cir. 1942), 126 F.2d 155.....	43
Van Meter v. Franklin Fire Ins. Co. (9th Cir. 1947), 164 F.2d 325	20
Walker v. Mink (1945), 117 Mont. 351, 158 P.2d 630.....	25
Weaver v. United States (9th Cir. 1954), 216 F.2d 23.....	43, 46
Wyman v. Dunne (1961), 83 Idaho 179, 359 P.2d 1010....	41
Young v. California Ins. Co. (1935), 55 Idaho 682, 46 P.2d 718	25

Codes

Idaho Code:	
Section 9-1204	52
Section 9-1207	41
Title 28, U.S.C.A.:	
Section 1332	2
Section 1391	2
Section 2201	2
Section 2202	2

Rules

Federal Rules of Civil Procedure, Rule 43(a)	40
----------------------------------------------------	----

Texts

58 Am. Jur. 328, Witnesses, Section 588	48
82 A.L.R. 2d 537	53
125 A.L.R. 165	53
3 Wigmore, Evidence (1940), Section 734, p. 64	53

No. 20,323

**United States Court of Appeals
For the Ninth Circuit**

HARTFORD FIRE INSURANCE COMPANY,
a corporation,

Appellant,

vs.

O. T. JONES and RUBY I. JONES,

Appellees.

APPELLANT'S OPENING BRIEF

STATEMENT OF PLEADINGS

I. Jurisdiction of the Court.

This is an appeal from that portion of a judgment directing a finding of liability against appellant after a trial in the United States District Court for the District of Idaho, Eastern Division, before the Honorable Fred M. Taylor, District Judge, in an action in declaratory relief to determine the rights, liabilities, duties, responsibilities and legal relationship of the parties under the provisions of a policy of fire insurance issued by Appellant.

Jurisdiction of the cause below was founded on diversity of citizenship and amount in controversy,

pursuant to sections 1332, 1391, 2201 and 2202, Title 28, United States Code.

The pleadings show that defendants, O. T. Jones and Ruby I. Jones, each was a citizen of the State of Idaho, while plaintiff, Hartford Fire Insurance Company (hereinafter "Hartford") was a corporation organized under the laws of Connecticut, with its principal place of business in Connecticut and authorized to conduct insurance business in the State of Idaho; the matter in controversy exceeds, exclusive of interest and costs, the sum of \$10,000.00. (C.T. pp. 3-4, 6, 32, 37, 47.)¹

II. Pleadings.

The pleadings consist of a complaint in declaratory relief filed by Appellant; Answer and Cross-Complaint filed by Appellees, and Answer to Cross-Complaint filed by Appellant. (C.T. 3-17.)

A. Complaint in declaratory relief.

In its complaint in declaratory relief Appellant, Hartford, alleged its corporate existence under the laws of Connecticut and its authority to conduct an insurance business in the State of Idaho. It alleged that Appellees were the owners of a motel building situated one and one-half miles west of Arco, Idaho and all the personal property located therein with the exception of some personal property located in one unit of the motel; execution of a standard Idaho fire insurance policy insuring Appellees against loss

¹"C.T." refers to clerk's transcript of record designated as Volume 1 in this record on appeal.

by fire to said motel up to a limit of liability of \$28,000 and loss by fire to personal property located therein up to a limit of liability of \$7,000, with a lender's loss payable endorsement, making the loss payable first to the Standard Insurance Company, as its interest may appear; that on June 11, 1963 the motel and personal property were wilfully set on fire, and receipt of a sworn statement in Proof of Loss executed by Appellees wherein they claimed the sum of \$21,212 as building loss and the sum of \$5,000 for loss of personal property. It further alleged that Appellees entered into a conspiracy to defraud Appellant by wilfully causing said fire and filing a false and fraudulent sworn statement in proof of loss; pursuant to said conspiracy, Appellees wilfully caused the fire, and filed a false and fraudulent proof of loss wherein they denied knowing the cause of the fire; that they had done nothing to violate the conditions of the policy or attempt to deceive the company, and that Appellees overstated the amount of loss and damage; that Appellees had violated provisions of the policy relating to Concealment, Fraud, duty of insured to save and preserve the property, and increase hazards; that the actual cash value and amount of loss was substantially less than that claimed by Appellees; that an actual dispute and present controversy existed in as much as Appellant contends that it was under no obligation to pay any insurance proceeds to Appellees by virtue of said violations and the fraudulent conspiracy. Appellant additionally contended that it should be indemnified by Appellees for any amount

Appellant was obligated to pay to said loss payee, Standard Insurance Company. (C.T. pp. 3-6.)

B. Answer.

In their answer, Appellees admitted all the allegations of the complaint, except they denied wilfully causing said fire, denied violating the provisions of the policy and denied filing a false and fraudulent sworn statement in proof of loss. They alleged that if said fire was wilfully caused by some person said loss was still covered under the terms of the policy and that a dispute and controversy existed because Appellant refused to pay the amount due under the terms of the policy. (C.T. pp. 8-9.)

C. Cross-Complaint.

In its cross-complaint, Appellant realleged the facts as to citizenship, amount in controversy; ownership of the property subject only to the interest of a mortgagee, Utah Mortgage Loan Company; existence of a standard Idaho fire insurance policy with the terms and limits as set forth in the complaint which was in effect on the date of the fire; the fact of fire; timely filing of a sworn statement in proof of loss; compliance with all covenants and conditions of the policy; demand for payment in the amount of \$30,000.00 and \$2,000.00 as attorney's fees, and failure to pay. (C.T. pp. 11-13.)

D. Answer to Cross-Complaint.

In its answer to the Cross-Complaint, Appellant admitted the allegations as to citizenship; the

existence of a standard Idaho fire insurance policy; the fact of fire; receipt of the sworn statement in proof of loss filed by Appellees and demand for payment and refusal by Appellant. All other allegations were denied, either specifically or because of insufficient knowledge or information on the part of Appellant. Appellant further re-alleged, re-adopted and re-affirmed the allegations contained in its complaint in declaratory relief as an affirmative defense to Appellees' cross-complaint. (C.T. pp. 14-16.)

STATEMENT OF THE CASE

This is an action on an Idaho standard form fire insurance policy. (Ex. 1.) Appellant contended that Appellees committed fraud, concealment and false swearing, relating to material facts and circumstances, such as knowledge of the time and origin of the fire (incendiary), fraudulent proof of loss, and wilfull overstatement of value and damage; and they conspired to defraud Appellant by setting said fire and submitting a false proof of loss.

About 2:05 a.m., on June 11, 1963, the Arco fire department received a call for a fire inside each unit of the four unit motel located on highway 93A, approximately one and one-half miles west of Arco, Idaho, owned by Appellees, Mr. and Mrs. O. T. Jones (R.T. 14.)² A separate fire originated in each unit in

²"R.T." refers to reporter's transcript designated as Volume 2 in this record on appeal.

the vicinity of small electric stoves situate therein, and spread upward and outward within the respective units. The fires in Units 2 and 3 burned to a point where they joined. The fires in Units 1 and 4, the units located at either end of the building, were unconnected with the burning in Units 2 and 3, and there was no joining of charred wood. (R.T. 19, 21, 22, 25.)

At the time of their arrival, members of the Arco Fire Department gained entrance into each unit by breaking through the doors and windows. (R.T. 16.) After suppressing the fire, fire personnel observed in Unit 1 a trail of cloth on the floor leading from the stove into the bedroom. The cloth had an odor of kerosene or distillate—a petroleum product. (R.T. p. 20.) In Unit 4 they observed a similar trail of rags leading from the waste basket to the bedroom; this trail, as well as the bed clothes themselves, had an odor of a petroleum product. (R.T. 23-24.) They also detected an odor on a rug located on the floor in Unit 4. (R.T. 24.) A subsequent investigation by fire personnel, in the company of an agent of the National Board of Fire Underwriters, revealed that underneath one of the burners on each stove in Units 1, 2 and 3 there was green plastic material. (R.T. 27-28, 134-135.) In Unit 4, the same green plastic material was found either underneath the burner, or over the front of the stove. (R.T. 27-28, 136.) There was found in Unit 1 a greenish plastic jug similar to that used as a container for Purex or Clorox from which the top had been cut. (R.T. 29, 64.) The burner controls on all of the stoves were in the “on” position. (R.T. 64-65, 66-67, 86-87, 133.)

Mr. Steve Kennedy, Special Agent for the National Board of Fire Underwriters and the Arco Fire Chief testified that they had investigated this fire and both were of the opinion that this was a set fire. (R.T. 29, 137.) Mr. Kennedy stated that it was his opinion that combustible material was placed in plastic containers, placed on a burner of each stove and the heat from these burners ignited the combustible material. His estimate was that such ignition would take over thirty minutes. (R.T. 138.)

On Saturday, June 8, 1963, Appellee, Mrs. Ruby Jones, was in the motel at about 4:00 p.m. and when she left the premises all of the doors were locked. (R.T. 110, 203, 206.) No one had the keys to Units 1, 3 and 4 other than Appellees, and the keys to Unit 2 were in the possession of Appellees and a tenant who was not in the area at the time of the fire. (R.T. 109-110.)

There was no means of ready access from the individual units in the motel so that entry to any individual unit would not give one access to other units.

On Monday, June 10, 1963, Appellees left Arco before noon for Caldwell and Jerome, Idaho. (R.T. 170-171.) Appellee, O. T. Jones, testified as to their activities during the afternoon and early evening hours of June 10, 1963. (R.T. 172-175.) They left Jerome and drove to Shoshone, Idaho—a distance of about twenty miles, arriving there at approximately eleven. (R.T. 175-176.) After a conversation with an unidentified individual, Appellees testified that they

checked into Young's Motel in Shoshone at about 11:00 p.m., and finally retired for the evening about midnight. (R.T. 176-178.) There was no evidence, other than Appellees testimony, which placed them in Shoshone during this period of time. The owner and operator of Young's Motel specifically contradicted Appellees' testimony as to the time they checked into the motel. She testified that she had registered Appellee into the motel between five and five-thirty on the afternoon of June 10, 1963, and that she did not see him again until the afternoon of June 11, 1963. (R.T. 258, 261-262.) At that time Appellee returned to the motel and requested a receipt for the lodging of the night before. (R.T. 195.) Shoshone is about 90 miles from Arco, a drive of approximately one and one-half hours. (R.T. 191.)

Appellee, O. T. Jones, testified that they left Young's Motel in Shoshone at about 7:00 a.m. on June 11, 1963 and drove to Caldwell where they arrived at eleven. They at that time learned of the fire at their motel in Arco, and, after a visit of about one hour, returned to Arco. (R.T. 178-180.) Enroute to Arco, they stopped in Shoshone to obtain a receipt from Young's Motel. (R.T. 195.)

Appellees had a financial motive to conspire to defraud Appellant. Unit 1 of the motel had not been rented since December, 1962; Unit 2 was rented at the rate of sixty-five dollars a month; Unit 3 had been vacant since November 18, 1962; Unit 4 had been vacant since July 1, 1962; (R.T. 106-109) Appellees owned a farm and had realized no income on that farm

from January, 1962, to the date of the fire; there was a first and second mortgage against the motel in the amount of \$5,390.00 with a payment due on July 1, 1963 in the amount of \$450.00; Appellees had two other mortgages with Utah Mortgage Loan in the amount of \$11,000.00 and \$865.00 with payments due on July 1, 1963 in the amount of \$953.00 and \$52.00 respectively; Appellees had two other mortgages in the amount of \$11,500.00 and \$905.00 with payments due on July 1, 1963 in the amount of \$1,035.00 and \$82.00 respectively; Appellees had a note in the amount of \$2,100.00 with the Custer County Bank, at least a portion of which was past due in June, 1963; Appellees had an obligation to the Butte County Bank of \$5,000.00 which was delinquent in June, 1962; Appellees had an obligation with the Prudential Federal Savings and Loan in the amount of \$3,750.00 which was delinquent in June, 1963. Appellees' tax return for 1962 shows that their business income for that year was a loss of \$327.24. (R.T. 111-120.)

Prior to the fire at their motel on June 11, 1963, Appellees had sustained three previous fire losses; one was the fire loss in a potato cellar in Arco in 1960; a fire loss on this same motel approximately ten years before and a fire loss on a private residence in Blackfoot, Idaho. (R.T. 121-122.)

The questions involved in this appeal and the manner in which they are raised are as follows:

1. The error of the trial Court in withdrawing from the jury, the issue of Appellant's liability. At the conclusion of the evidence, Appellees moved for a

directed verdict as to liability; said motion was granted and the Court did not submit to the jury the issues of fraud and concealment, relating to the origin of the fire, and conspiracy by wilfully causing the fire and filing a false proof of loss.

2. The error of the trial Court in instructing the jury that the only questioning remaining for its consideration was the amount of damages and withdrawing from the jury the following issues:

- (a) Violation of the fraud and concealment provisions of the policy;
- (b) Fraud and concealment as to knowledge of the origin of the fire;
- (c) Fraud and concealment as to the actual value of the property and the actual damage and loss suffered.

was raised by exceptions noted to said instructions.

3. The refusal of the trial Court to allow Appellant to claim surprise as to the testimony of Betty Oldham; cross-examine her as to her prior statements; introduce her written statement which was marked as Exhibit 10 for identification and introduce testimony of prior inconsistent statement.

SPECIFICATIONS OF ERROR

Appellant urges that the trial Court erred in:

- I. GRANTING APPELLEES' MOTION FOR A DIRECTED VERDICT ON THE ISSUE OF LIABILITY AND REFUSING TO SUBMIT TO THE JURY THE DEFENSES OF AN INCENDIARY FIRE AND CONSPIRACY TO DEFRAUD APPELLANT BY SETTING THE FIRE AND BY FILING A FALSE AND FRAUDULENT PROOF OF LOSS. (R.T. 288, 293.)

At the conclusion of all the evidence, Appellees moved for a directed verdict on the issue of liability asserting that there was no evidence connecting Appellees with the setting of this fire. (R.T. 284-286.) This motion was opposed by Appellant on the grounds that there was sufficient direct and circumstantial evidence to raise a jury question on the issue of liability. (R.T. 286-288.) At the conclusion of argument the Court stated:

"I will have to admit there is evidence in the record which might cause somebody to suspect something. It is like charging somebody with a crime. There is the suspicion and here the insurance company has done just that, but in the opinion of the Court there is no evidence in the record which would connect these defendants with setting the fire. There may be some circumstances which might cause somebody to question whether they were at a certain place at a certain time, but as to the liability question, I don't think the insurance company has shown that these people had anything to do with setting the fire. The evidence shows that it was a set fire, but I can't see how, even on instructions to the jury, how this Court can submit the question to the jury and consequently, I am going to instruct the jury and

withdraw the question of liability from the jury, and instruct them that they should only find the damages. The motion is granted.”

It then proceeded to instruct the jury as follows:

“You are instructed that the court has withdrawn from your consideration and determination the question of the liability of the plaintiff, Hartford Fire Insurance Company, to the Defendants and counterclaimants, O. T. Jones and Ruby I. Jones. Stated another way, the defendants and counterclaimants are entitled to recover the amount of damages they sustained by reason of the fire in their motel. The only question remaining for your determination is the amount of damages the defendants and counterclaimants are entitled to recover under the insurance policy.”

II. REFUSING APPELLANT’S CLAIM OF SURPRISE AS TO THE TESTIMONY OF BETTY OLDHAM; REFUSING TO ALLOW APPELLANT TO CROSS-EXAMINE HER CONCERNING HER EARLIER STATEMENTS; REFUSING TO ADMIT HER WRITTEN STATEMENT, AND REFUSING TO ALLOW TESTIMONY OF PRIOR INCONSISTENT STATEMENTS.

Appellant called a witness, Betty Oldham, in its case in chief and started to examine her concerning her activities on the night of June 10-11, 1963. Mrs. Oldham testified that at the time of the fire she lived behind the Appellees in a house which she rented from them. (R.T. 40-41.) In the course of this examination the following occurred:

“Q. Mrs. Oldham, did you see a car parked in the area around the Jones home?

*

*

*

The Witness: No, sir." (R.T. 42.)

* * *

"Q. Did you see a red and white car there?

A. I might have, I don't remember." (R.T. 43.)

* * *

"Q. Didn't you go over and strike a match to see the license plate of a car?

* * *

The Witness: No, sir." (R.T. 43.)

Shortly thereafter, Appellant had marked for identification Exhibit 10, which was a two page document bearing Mrs. Oldham's signature. (R.T. 44.) The witness then read the statement, but her memory was not refreshed by reading the statement. However, she testified as follows (R.T. 49-51):

By Mr. Merrill:

"Q. Mrs. Oldham, when you gave the statement and you signed the statement and stated that it was true, isn't it a fact that the statements in there are true?

A. I don't understand.

Q. The statements that are in the written statement that you have in front of you, those were told to you by [sic] Mr. Kennedy with the Chief of Police, Jardine, there?

A. Yes, sir.

Q. And you were attempting to tell them the truth?

A. Yes, sir.

Q. And they read the statement to you and you signed it?

A. Yes, sir.

Q. And is it your statement now that you don't recall whether you lit a match?

A. There is a lot I don't remember.

Q. You don't remember at this time? Does the reading of the statement bring it back to your mind?

A. No, sir.

Q. You just have no recollection about whether you lit the match?

A. I don't remember.

Q. You just don't remember?

A. No, sir.

Q. You said there might have been a red and white Ford car parked there?

A. I don't remember.

Q. Didn't you, just a few minutes ago, say there might have been a red and white Ford?

A. There might have been.

Q. Do you have any recollection at this moment whether you did or did not?

A. No."

* * *

By Mr. Smith (R.T. 53-54):

"Q. And your testimony is that you are not able to remember what happened that night?

A. Yes, sir.

Q. That is the truth?

A. Yes, sir."

* * *

By Mr. Smith (R.T. 55):

"Q. And isn't it a fact that you told the Sheriff and Mr. Jardine, the Chief of Police, at that time, that you could not remember what happened that night because you had been drinking?

A. Yes, sir.

Q. And that was after you signed this statement—whatever it is—wasn't it?

A. Yes, sir. It was—I'm sorry——

Q. And is it not a fact that you could not remember what happened that night because you had been drinking; isn't that the truth?

A. Right."

Appellant offered the statement into evidence on two grounds; first, it was admissible as evidence of past recollection recorded; second, that it could be used as impeachment based on his claim of surprise. (p. 148-150.) At that point the Court reserved ruling but stated in part:

"She did not admit the truth of the statement. She didn't admit that on the witness stand. You were permitted to interrogate her, which goes along the lines of the cases which you cited. As far as surprise, I don't think that you can claim that. If you didn't talk to the witness and go over the statement as a witness, obviously you should have. I don't think there is any surprise. The statement was given in September of 1963 and it seems to me that this was no surprise—there could be no surprise here. It might be, depending upon saying what was in the statement, but you could have known before she took the witness stand whether she was going to say these things she did. You called her as your witness." (R.T. 152.)

The Court eventually ruled that Exhibit 10 was inadmissible. (R.T. 283.)

Further, Appellant sought to question Mr. Kennedy, Chief of Police Jardine and Sheriff Johnson concerning the earlier statements. During direct examination of Chief Jardine the following occurred:

By Mr. Merrill:

“Q. Do you know whether Mrs. Oldham was asked if she saw a red and white Ford in the vicinity on the morning of June 11 in 1963?

Mr. Smith: To which I object, it is an attempt to impeach the witness of the Plaintiff and the matter has been gone into and ruled upon.

The Court: Objection sustained.” (R.T. 92-93.)

* * *

By Mr. Merrill:

“Q. Did Mrs. Oldham at the time that the statement was taken indicate that she could not remember what happened?

Mr. Smith: We object, it is an attempt to impeach the witness.

The Court: Objection sustained.”

By Mr. Merrill:

“Q. Did you sign this after Mrs. Oldham did?

A. Yes.

Q. Before Mrs. Oldham signed, did she ask to have any of it corrected?

Mr. Smith: Object on the same ground, it is impeachment.

The Court: Objection sustained.” (R.T. 93-94.)

* * *

“Mr. Merrill: It is based on two points: I think we have laid sufficient foundation so that it is within the area of the legal surprise and could be considered as an adverse witness.

The Court: I don't think there is a foundation for surprise. You have not shown that you talked to the witness before coming into court." (R.T. 96-97.)

During examination of Sheriff Johnson the following occurred:

"By Mr. Smith:

Q. Let me ask you this: After this statement was signed, didn't Mrs. Oldham repudiate it before she came to court.

A. She did.

Mr. Smith: Thank you.

Recross Examination

By Mr. Merrill:

Q. What statement did she repudiate; what was the original statement?

A. Well, do you want me to relate?

Q. Yes, the original statement.

Mr. Smith: I object to going into the statement which is hearsay and is an effort to impeach his witness.

The Court: Objection sustained. You do not need to argue it." (R.T. 101-102.)

And in questioning Mr. Kennedy, the following occurred:

"Q. On that occasion, was there a written statement taken?

A. Yes.

Q. Could you tell how it was taken—not what was in it?

A. I wrote up the statement after asking her various questions, including some of the informa-

tion that had been given to us on the previous interview.

Mr. Smith: We would like to object, it goes apparently that it is an attempt to impeach one of the plaintiff's witnesses that has testified to the fact.

Mr. Merrill: At this point it is not.

The Court: It has gone far enough. He took a statement. The objection is sustained." (R.T. 139-140.)

SUMMARY OF ARGUMENT

It was error for the trial Court to withdraw from the jury the issue of Appellant's liability and refusing to submit to the jury the defenses of an incendiary fire and conspiracy to defraud Appellant by setting the fire and by filing a false and fraudulent proof of loss, as there was substantial evidence entitling the jury to pass on these issues.

The evidence in this case clearly demonstrated that the fire was of incendiary origin. There were four separate fires, each originating inside separate locked units of a single building. There was evidence that inflammable liquids had been used to ignite the fire and to accelerate its spread. Rugs, bedclothing and rags were found soaked with a petroleum base product; in two units the rags were laid as a trail from the stove to the bedroom. Containers were found which apparently had contained this inflammable liquid in areas where such containers would not ordinarily be placed.

The evidence was legally sufficient to establish that Appellees had willfully caused this fire. They were the only individuals who had access to all four units of the motel; the motel was not a paying proposition and had produced no meaningful income for a period of one year prior to the fire. There was sufficient evidence of a financial motive to induce Appellees to wilfully cause this fire and their conduct following the loss was such that the jury could reasonably infer that they were connected with the setting of this fire.

Appellant's claim of surprise was proper. The witness, Betty Oldham, had given a signed statement prior to the trial and Appellant had no reason to believe that she would not testify consistent with that statement at time of trial. When she changed her testimony after being called by the Appellant, it was error for the trial Court to hold that Appellant could not impeach the witness by introducing evidence of her prior inconsistent statements.

Plaintiff's Exhibit No. 10 should have been admitted into evidence. The proper foundation was laid for its admissibility as past recollection recorded, and the witness testified that rereading the statement did not refresh her recollection of the facts themselves, but she testified that at the time she made the statement she was telling the truth.

ARGUMENT

I. IDAHO RULE OF LAW APPLICABLE.

In diversity of citizenship cases involving an insurance policy, questions of burden of proof, presumptions, sufficiency of evidence and the interpretation of rights and obligations under a policy are matters of substantive law in which it is the duty of the trial Court to apply the State rule.

Erie Railroad Co. v. Tompkins (1938) 304 U.S. 64;

Palmer v. Hoffman (1943) 318 U.S. 109;

Van Meter v. Franklin Fire Ins. Co. (9th Cir. 1947) 164 F.2d 325;

Hyland v. Miller Nat. Ins. Co. (9th Cir. 1947) 91 F.2d 735, 737.

A. Idaho Rules on Motions for Directed Verdicts.

The Supreme Court of Idaho has stated on many occasions the principles which control in determining the propriety of granting a directed verdict on any issue. See for example the following language in *McCormick and Co. v. Tolmie* (1926) 42 Idaho 1, 6, 243 Pac. 355, 357, cited with approval in *Conklin v. Patterson* (1963) 85 Idaho 331, 379 P.2d 428, 430:

“The motion for a directed verdict admits the truth of all the evidence in favor of the defendants and every inference of fact that may legitimately be drawn therefrom (citation omitted), and should have been denied unless there was no evidence material to the defense on any question of fact about which reasonable minds might dif-

fer, which, if found in favor of the defendants would have supported a verdict for them. (Citations omitted.)”

To this same effect was the holding in *Smith v. Big Lost River Irrigation District* (1961) 83 Idaho 374, 364 P.2d 146 wherein the Court said:

“This court is firmly committed to the rules that a trial court should not take a case from the jury unless, as a matter of law, no recovery could be had upon any view which properly could be taken of the evidence.”

The Idaho Court has further held that in passing on a motion for a directed verdict, the trial Court may not weigh the evidence or resolve conflicts. *Buffat v. Schnuckle* (1957) 79 Idaho 314, 316 P.2d 887. In that case the Court held:

“The court may not weigh the evidence, or resolve the conflicts therein, or determine what conclusions should be drawn therefrom. That is the function of the jury, and the essence of a jury trial.”

An excellent discussion in admitting evidence for the consideration of the jury where the witness' capacity is limited, is found in *O'Shea v. Jewel Tea Co.* (7th Cir. 1956) 233 F.2d 530, 532-534. In summary the Court stated:

“The fact that the witness was old and admitted that there were many things he could not remember did not furnish sufficient grounds for finding him incompetent to testify as to those things that

he could remember. When a witness takes the stand, he is presumed to be competent until shown to be otherwise. *Stephan v. United States*, 6 Cir., 133 F.2d 87, 95. There was nothing in this record sufficient to support the trial judge's decision that Dr. Plice was incompetent to testify as to those things that he said he could remember. On the record before us, striking the doctor's testimony and instructing the jury to disregard it was an abuse of discretion. It was prejudicial because the doctor had testified that he remembered that Mrs. O'Shea had had a prior accident in a store. If allowed to stand this would have tended to cast doubt on the truth of Mrs. O'Shea's testimony that Dr. Plice had never treated her for a prior injury. The doctor's testimony would, therefore, have gone to the plaintiff's credibility."

The trial Court in the case at bar failed to heed this clear admonition. Instead it weighed the evidence, passed on credibility of witnesses and failed to accept the most favorable view of Appellant's evidence or draw all legitimate inferences therefrom.

In this case, it is clear that the trial Court violated the above mentioned principles. First, as will be discussed *infra*, Sections II and III, there was sufficient evidence to justify submitting the question of liability to the jury. Second in passing on this motion, the trial judge passed on the credibility of the witness, Betty Oldham.

"The rest of the opportunity problem is wrapped up in the evidence of Mrs. Oldham, and we submit that the evidence there is sufficient to create a serious question as to whether they were there.

The Court: Do you think that anybody could believe the testimony of that witness?"

Third, the trial Court weighed the evidence when it disregarded the significance of the direct contradiction in testimony between the Appellees and Mrs. Young.

"Several other things, there was an alibi as to where they were. It is disputed by the evidence of Mrs. Young, and if the jury should agree——

The Court: How was it disputed. The only dispute is when they registered. That is not as to where they were."

The jury could well have found this contradiction to be material. Appellees were attempting to establish their presence 90 miles from scene of fire. Their testimony in this regard was false. It was not for the trial Court to reject the significance of its falsity.

B. Fraud, Conspiracy to Defraud by an Incendiary Fire or False Proof of Loss Are Provable by Circumstantial Evidence.

In a civil action, a conspiracy, fraud or an incendiary fire is each provable by circumstantial evidence.

1. Incendiary Fire.

Exhaustive research has failed to reveal any Idaho cases directly in point, but this Court is not without guidance. The State Courts in California have had a number of opportunities to pass on this question, particularly in criminal cases, and they have uniformly

held that circumstantial evidence, even in criminal cases with their more difficult burden of proof, is sufficient to prove the incendiary nature of a fire.

People v. Hays (1950) 101 C.A.2d 305, 311, 225 P.2d 600;

People v. Freeman (1955) 135 C.A.2d 11, 15, 286 P.2d 565;

People v. Miller (1940) 41 C.A.2d 252, 106 P.2d 239.

Other jurisdictions in this circuit have also held that circumstantial evidence was sufficient to support a criminal conviction of arson.

State v. Van Bogart (1958) 85 Ariz. 63, 331 P.2d 597, *cert.den.* 359 U.S. 973;

State v. Gore (1940) 152 Kan. 551, 106 P.2d 704;

O'Briant v. State (1956) 72 Nev. 100, 295 P.2d 396;

State v. Molitor (1955) 205 Oregon 698, 289 P.2d 1090;

State v. Turner (1961) 58 Wash.2d 159, 361 P.2d 581.

No reason can be advanced why this same rule would not be followed by an Idaho State Court if it were called upon to rule on this question.

2. Fraud.

Penn Mut. Life Ins. Co. v. Ireton (1937) 57 Idaho 466, 65 P.2d 1032, 1039. Fraud is to be determined from all the facts and circumstances of the case. Again, as on the issue of the incendiary fire, we may

look to relevant authorities in other jurisdictions. In California, the courts have frequently held that fraud may be proved by circumstantial evidence.

Batchelor v. Finn (1959) 169 C.A.2d 410, 341 P.2d 803;

Dandini v. Dandini (1953) 120 C.A.2d 211, 260 P.2d 1033.

To the same effect in other jurisdictions are the following:

Breidenthal v. Breidenthal (1957) 182 Kan. 23, 318 P.2d 981;

Walker v. Mink (1945) 117 Mont. 351, 158 P.2d 630;

Saunders v. Visser (1944) 20 Wash.2d 58, 145 P.2d 898.

While the burden of proving such defenses is on the insurance company, it does not have to be proved beyond "reasonable doubt" as required in a criminal prosecution; but the insurance company has met its burden when any of said defenses are established by a mere preponderance of the evidence, because it is a civil case. *Young v. California Ins. Co.* (1935) 55 Idaho 682, 46 P.2d 718, 720, where the Idaho Supreme Court approved instructions stating that "one alleging fraud has the burden of proving it by a preponderance of the evidence." This is also the rule in other relevant jurisdictions.

Treadwell v. Nickel (1924) 194 Cal. 243, 260, 228 P. 25;

McIntosh v. Eagle Fire Company of New York (4th Cir. 1963) 325 P.2d 99.

II. EVIDENCE WAS LEGALLY SUFFICIENT TO ESTABLISH INCENDIARY FIRE.

About 2:05 a.m., on June 11, 1963, the Arco Fire Department received a report of a fire in the motel owned by Appellees, located on highway 93A, approximately one and one-half miles west of Arco, Idaho. This fire caused damage to the building and the personal property contained therein. (R.T. 14.)

A. Description of Building.

This motel was a single building approximately seventeen feet wide and one hundred twenty-five feet long which ran roughly east and west, perpendicular to the highway. This single building was divided into units, each of which was separated from the other by a wall which contained no door or other means of common access. The only access to each unit was by means of an outside door. The two center units had windows on the front and rear walls, the end units had windows on the side, as well as the front and rear. (R.T. 168-169.) The four units of the motel were similar in size and lay-out, each contained a kitchen, bedroom and bath. The furniture in the kitchen consisted of a stove, refrigerator, table and chairs. In the bedroom there was a bed, chairs, dresser and a chest of drawers. (R.T. 186, 206, 207.) In the ceiling of each unit there was a covered opening which led into a common attic space. These openings were located in different places in each unit—kitchen or entrance to bedroom in Unit 1; bathroom in Unit 3, and in a closet in Unit 4. (R.T. 31, 32.) There were no stairs leading to these openings, and access could only be

obtained by placing some object below the opening, removing the cover and pulling oneself up and into the attic. (R.T. 33-34.)

B. Point of Origin of Each Fire Was in the Area of the Stoves Located in the Kitchens.

The fires originated separately in each unit and, only in the case of the fires in Units 2 and 3, did the char join. In each unit the area of heaviest burning was around the electric stove, and it was the opinion of the investigative personnel that all fires had started near the stove. (R.T. 21, 101, 136.)

C. Finding of a Criminal Agent at Point of Origin Is Evidence of Incendiary Fire.

1. Presence of Criminal Agent at Scene.

The unexplained presence of a petroleum product at point of origin and throughout the motel is sufficient to establish a fire is of incendiary origin.

People v. Gilyard (1933) 134 Cal.App. 184, 189, 25 P.2d 35;

People v. Kasparoff (1928) 94 Cal.App. 7, 9-10, 270 P. 398;

O'Briant v. State (1956) 72 Nev. 100, 295 P.2d 396, 397;

Grimes v. State, 79 Ga.App. 489, 54 S.E.2d 302.

In *People v. Gilyard, supra*, the Court said:

“A jar of earth taken by the police from beneath the partially burned house and giving forth the odor of kerosene was admitted in evidence. There was no error here, as this real evidence tended to prove that the fire was of incendiary origin.

2. Existence of Several Unconnected Fires.

The presence of separate and distinct fires on the premises is evidence sufficient to establish that they are of incendiary origin.

People v. Hays (1950) 101 C.A.2d 305, 311, 225 P.2d 600;

People v. Sherman (1950) 97 C.A.2d 245, 249, 217 P.2d 715;

O'Briant v. State (1956) 72 Nev. 100, 295 P.2d 396, 397;

British America Assur. Co. v. Bowen (10th Cir. 1943) 134 F.2d 256.

In both *People v. Hays, supra* and *O'Briant v. State, supra*, there were separate fires and the presence of flammable fluids. In *People v. Hays*, the Court held:

"It has been repeatedly held that incendiary origin of a fire is generally established by circumstantial evidence such as the finding of separate and distinct fires on the premises. (citations omitted) Here, there is evidence of four separate and unrelated fires . . . and that debris smelling of petroleum products was near another hole in the plaster." (101 C.A.2d 305, 311.)

And in *O'Briant v. State*, the Court stated:

"The testimony of experts establishes that the fire in fact was composed of two independent and unconnected fires Further pointing toward the incendiary character of the fires was the fact that tests of flooring in each burned corner indicated the presence of petroleum residue. There can be no question but that these facts are ample

to support a determination that the fire was incendiary in its nature.” (295 P.2d 396, 397.)

D. Evidence of Use of Liquid Inflammables to Cause Fire Found at Point of Origin and Throughout Units 1 and 4.

The evidence showed that in each unit of the motel were found pieces of green plastic beneath an electric burner of the stove. They also found, in Units 1 and 4, a trail of rags soaked in kerosene, oil or petroleum products leading from the stove to the bedroom. (R.T. 27-28, 136.) In Unit 4, they found the bedclothing similarly soaked with a petroleum product. Also, a rug was soaked with a similar product. (R.T. 20, 23-24, 87-88, 90.) The burning in Units 2 and 3 was too complete to recover any similar material from these units.

No evidence was offered by Appellees to account for or explain the presence of such inflammables in any of the units.

E. Evidence of Four Separate Fires.

The Arco Fire personnel, and the Special Agent from the National Board of Fire Underwriters, testified that there was evidence of four separate and distinct fires. The burning in Units 1 and 4 was completely unconnected. There was no point at which the char in these units joined the char in Units 2 and 3. Further, although the burning in Units 2 and 3 were connected, it was the opinion of all who investigated that there were separate and distinct points of origin and that the connection resulted from the pattern of burn. (R.T. 21, 101, 136.)

F. Uncontradicted Expert Opinion Was That This Was a Fire of Incendiary Origin.

A Special Agent of the National Board of Fire Underwriters investigated this fire and he was qualified at the trial as an expert in the field of arson investigation. (R.T. 131.) He testified that in his opinion this was a set fire. (R.T. 137.) He further testified that it was his opinion that the fire was set by placing flammable liquid in plastic containers and placing these containers on a burner of the electric stove. The burner was then turned on. After a sufficient period of time the heat ignited the liquid, thus causing the fire. (R.T. 137-138.) This testimony was never contradicted or disputed by Appellees.

III. EVIDENCE WAS LEGALLY SUFFICIENT TO ESTABLISH THAT APPELLEES WILFULLY CAUSED THIS FIRE.

At the outset, we respectfully submit that it must be conceded that proof of the connection of an insured with the setting of an incendiary fire can seldom be established by direct evidence. Arson is seldom committed in broad daylight and before interested spectators. The courts which have had occasion to pass on this question have recognized this difficulty and have held that the identity of the person or persons who caused a fire may be proved by circumstantial evidence.

People v. Hays (1950) 101 C.A.2d 305, 311, 225 P.2d 600;

People v. Freeman (1955) 135 C.A.2d 11, 15, 286 P.2d 565;

Carpenter v. Union Insurance Society of Canton, Ltd. (4th Cir. 1960) 284 F.2d 155.

Among the circumstances which are held to be relevant are opportunity; access to premises; motive and conduct.

People v. Hays (1950), *supra*;

People v. Freeman (1955), *supra*;

British America Assur. Co. v. Bowen (10th Cir. 1943) 134 F.2d 256, 260;

People v. Kessler (1944) 62 C.A.2d 817, 821, 145 P.2d 656.

As was said by the Court in *People v. Hays, supra*:

“The identity of the defendant as the person who committed the crime may be proved by circumstantial evidence tending to connect her with the crime. [cita. omitted] Such circumstantial evidence may consist of proof of motive and conduct of the defendant which tends to connect her with the crime, and statements which show a consciousness of guilt.” (101 C.A.2d 305, 311.)

See also *People v. Freeman, supra*, where the Court said:

“The circumstances relied upon by the People to sustain the verdict of the jury are the conceded incendiary character of the fires, the opportunity appellant had to set them . . . the heavy indebtedness of the appellant . . .”

All of these circumstances were present in this case.

A. Appellees Had the Opportunity to Set the Fire.

Appellee, Ruby Jones, was in the motel on the Saturday preceding the fire. (R.T. 203.) There was no evidence that anyone else was in the motel with the exception of the occupant of Unit 2, who may have

been there on the evening of June 9, 1963. (R.T. 108-109.)

The last eyewitness to Appellees' whereabouts prior to the fire placed them in Jerome at about 10:00 p.m., four hours prior to the fire. (R.T. 227.) Appellees' statement that they checked into Young's Motel in Shoshone at 11:00 p.m. was specifically contradicted by the operator of the motel. (R.T. 258, 266.) Hence, there is no eyewitness who stated that he saw Appellees in Shoshone at any time that evening; in spite of Appellees' statement that they talked to people in Shoshone sometime after their arrival. (R.T. 176.)

In any case, the distance from Shoshone to Arco is only about 90 miles. (R.T. 191.) Thus, Appellees had ample opportunity to return to Arco, set this fire and return to Shoshone.

In *British America Assur. Co. v. Bowen* (10th Cir. 1943) 134 F.2d 256, the insured testified that she spent the evening in a town 39 miles away from the scene of the fire and produced a witness who testified that the insured was there when he retired on the night of the fire and she was there the next morning. In spite of this evidence, the Court, in sustaining a judgment for the company said:

"The distance from Shawnee to Oklahoma City over paved highway is only 39 miles. No witness saw her from 10:30 p.m., October 3, until the morning of October 4. She could have readily traveled to Oklahoma City and set the fire between 10:30 p.m., and midnight of October 3, and returned to Shawnee before the morning of October 4."

This is exactly the same inference which the jury could well have drawn in the case at bar. See also *Nathan v. St. Paul Mutual Insurance Co.*, 86 N.W.2d 503, where insured was denied recovery when he was seen entering the house the day before the fire, and at the time of the fire he was in Fullerton, Nebraska, which was approximately 500 miles removed from the scene of the fire; or *People v. Becker* (1949) 94 C.A. 2d 434, 210 P.2d 871.

One witness in Arco, Betty Oldham, testified that she might have seen a red and white Ford parked by the Appellees' home some short time prior to the fire. (R.T. 43.) The Appellees owned such a car at the time in question, and testified that this car was in Shoshone during that period of time. (R.T. 122-123, 230.)

No evidence was offered by Appellees, other than their own statements that they were in Shoshone, to show that they lacked the opportunity to set the fire.

B. No One Had Access to the Motel But Appellees.

The door leading into each specific unit only gave access to that specific unit. All of the keys to these doors were in the possession of Appellees with the exception of the one key to Unit 2 which was held both by Appellees and a tenant. (R.T. 109-110.)

All of the doors were locked after Appellees left the motel on June 8, 1963 (R.T. 110, 216), and all of the doors were locked when the fire department arrived to suppress the fire, with the exception of the door to Unit 3 which excessive heat had burned out. (R.T.

16.) There were no signs of forcible entry following the fire other than those made by the fire department. (R.T. 60-61.) Thus, the only persons who had access to all the units of the motel were the Appellees.

The fact that a building is locked with no sign of forcible entry when an incendiary fire is discovered is material circumstantial evidence connecting an insured to the fire.

People v. Kessler (1944) 62 C.A.2d 817, 821, 145 P.2d 656;

American Home Assurance Co. v. Essy (1960) 179 C.A.2d 19, 24;

British America Assur. Co. v. Bowen, supra.

It is true that the fire department found a side window in Unit 4, closed, but not locked. (R.T. 34.) But, as has been noted previously, access to Unit 4 gave no ready access to any other unit of the motel.

C. Appellees Had a Financial Motive to Set This Fire.

Evidence of financial condition is admissible to establish motive and is material circumstantial evidence which may connect a party with an incendiary fire.

People v. Freeman (1955) 135 C.A.2d 11, 14, 286 P.2d 565, where evidence showed insured in debt;

People v. Richard (1951) 101 C.A.2d 631, 637, 225 P.2d 938, where evidence showed that destroyed business not profitable;

People v. Hays, supra.

As was pointed out in *People v. Richard, supra*:

“In cases where circumstantial evidence is largely relied upon for conviction . . . then motive becomes a matter of earnest inquiry.”

The evidence in this case established a strong financial motive on the part of Appellees. The motel itself had been unoccupied, except for one unit, for over six months, and had had only one other unit rented for a short period for almost one year. (R.T. 106-109.) Hence, it seems clear that the motel was, economically, a losing business.

Further, at the time of the fire, Appellees were delinquent on three notes and payments on other indebtedness were coming due. Mortgage payments totaling \$2,572.00 were due as of July 1, 1963. (R.T. 111-120.)

Appellees were the owners of a farm which had produced no income since January, 1962. The income tax statement filed by Appellees showed a loss for the year 1962 in their business income. There was no evidence to establish that Appellees had any ready funds from which they could expect to meet their delinquent obligations and large prospective payments. (R.T. 114, 120.)

The Appellees were well aware of ability to obtain funds as a result of fire losses. The evidence establishes that Appellees had recovered for two other fire losses since 1950, one of which was on this particular motel. (R.T. 121-122.) Past history of fire losses may be considered by the jury in determining whether

Appellees set this fire with intent to defraud Appellant.

People v. Furgerson (1962) 209 C.A.2d 387, 25 Cal.Rptr. 818.

D. Conduct of Appellees Following the Loss Was Such That the Jury Could Infer Their Connection With This Fire.

At the time Appellees first heard of the fire loss they were in Caldwell, Idaho. Rather than return immediately to Arco, they remained in Caldwell visiting with friends. (R.T. 180.) En route from Caldwell to Arco they stopped at Young's Motel in Shoshone for the express purpose of obtaining a receipt to establish their whereabouts on the evening of June 10-11, 1963. (R.T. 195.) When they returned to Arco they called their attorney. (R.T. 181.) We submit that a jury could well infer that this conduct was inconsistent with Appellees' professed ignorance of the fire. Particularly, is this true of the stop in Shoshone to obtain a receipt for their night's lodging. Only if they realized at that time that the loss was suspicious would they have felt the need to establish their whereabouts. And the only way they could have realized this was for them to have been connected with the setting of the fire itself.

Therefore, we respectfully submit that there was substantial evidence to support a finding by the jury that Appellees had the only opportunity and access under the circumstances to set this fire; that they had a financial motive to defraud, conceal, conspire to defraud, set said fire and file a false proof of loss,

and that Appellees were connected with said fraud, concealment and conspiracy.

IV. APPELLANT'S CLAIM OF SURPRISE WAS PROPER AND IT WAS ERROR FOR THE TRIAL COURT TO EXCLUDE EVIDENCE OF THE WITNESS'S EARLIER INCONSISTENT STATEMENTS.

Appellant assigns as error the refusal of the trial Court to allow it to claim surprise as to the testimony of the witness Betty Oldham, and the concomitant refusal to allow Appellant to cross-examine this witness concerning earlier inconsistent statements or introduce, through other witnesses, evidence of her prior inconsistent statements.

A. Introduction.

Mrs. Betty Oldham was called by the Appellant in its case-in-chief. Prior to the trial she had given a signed statement to Mr. Kennedy, in the presence of Chief of Police Worth Jardine and Sheriff Ben Johnson. (R.T. 45, 91-92, 140.) In this statement she said that she had seen the Appellees' automobile near the scene of the fire a short while prior to the fire. She also said that she was certain that it was Appellees' car as she had struck a match and looked at the license number. (Plaintiff's Ex. No. 10.) However, in the course of her trial testimony, she stated that she did not see a car parked in that area; didn't use a match to look at a license plate, or, at least, didn't remember any of these facts. (R.T. 42-43, 49-51.) Appellant thereupon had the signed statement marked as

Plaintiff's Exhibit No. 10 for identification. Attempts were made to question the witness concerning her change in testimony, but objections to this line of questioning were sustained on the grounds that it was an attempt to impeach the witness. (R.T. 52.) When Appellant sought to introduce, through Mr. Jardine, testimony concerning these earlier statements, a similar objection was sustained. (R.T. 92-97.) Further, objections were sustained to the testimony of Mr. Johnson (R.T. 101-102) and Mr. Kennedy. (R.T. 139-140.) At the time Appellant sought to introduce the testimony of Mr. Jardine, the following offer of proof was made:

"The Court: Mr. Merrill, state what would be testified by the witness.

Mr. Merrill: Very well. At the time of the occurrence of taking the statement of Betty Oldham, she stated essentially as listed in Plaintiff's Exhibit No. 10 for identification. Secondly, that she did at that time state that she would swear on a stack of bibles that this was true and she saw the vehicle as stated in the statement; that she lit the match and saw the license number; that this was true and that she would swear to the same at any time." (R.T. 95-96.)

It should also be pointed out to show the right of Appellant to claim surprise and to present prior inconsistent statements, that Ben Johnson, a witness for Appellees, testified under questioning by counsel for Appellees, that Mrs. Oldham, in his presence, had repudiated the signed statement (Exhibit 10) on the grounds that she might or could have been in error

(R.T. 102-104.) It should be noted that this was not on the grounds that she could not remember, which was her reason on the witness stand, but as Sheriff Johnson said, beginning at page 102 of the Reporter's Transcript:

By Mr. Merrill:

“Q. Who was present when she repudiated it?

A. The attorney for the Jones and the Jardines, and myself.

Q. Was Mr. Kennedy there?

A. He was not.

Q. Did Mrs. Oldham say she didn't remember?

A. She said she was wrong on the accusation.

Q. She didn't tell you that she didn't remember?

A. No.

Q. Was she able to remember when she repudiated it?

A. It appeared so.

Q. Did she tell you why she was repudiating it?

A. No.

Q. Did she tell you that somebody had talked to her?

A. She said that the statement was untrue.

Q. Did she tell you how she found out?

A. No.

Q. Did she tell you if she had been talked to?

A. No.

Q. Did she talk to you at any other time?

A. Not to me.

Q. As far as you know, she did not?

A. Not to my knowledge.

Q. What she told you is that she found out she was wrong?

A. Yes.

Q. And she stated she did not remember?

A. No.

Q. She did not tell you where she found out?

A. She may have confused two nights. She changed her first statement and that was the only reason I know of that she changed her statement that it could have been another night.

Q. It could have been?

A. Yes."

The accumulated effect of all of the testimony by Mrs. Oldham and concerning Mrs. Oldham showed that the Appellant should have been sustained in the claim of surprise and should have been allowed to question the witness concerning her signed statement and other statements made by her, and should have been allowed to present evidence from others, Kennedy, Jardine, and Johnson, concerning inconsistent statements made by the witness.

Appellant respectfully submits that this impeaching evidence was erroneously excluded. This claim is assertedly based not only on relevant federal cases, but also on the clear language of relevant Idaho authorities. Rule 43(a), Fed.R.Civ.P., specifically provides, in part, as follows:

"All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of the evidence applied in the courts of general jurisdiction of the state in which the United States court is held.

In any case, the statute or rule which favors the reception of the evidence governs . . .”

B. Idaho Law Allows Impeachment of a Party's Own Witness.

Section 9-1207, Idaho Code, specifically provides for the impeachment of one's own witness. This Section states:

“9-1207. Impeachment of party's own witness. —The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made, at other times, statements inconsistent with his present testimony. (R.S., R.C., & C.L., Section 6080; C.S., Section 8036; I.C.A., Section 16-1207.)”

This Statute is unconditional on its face and it validly can be asserted that there need be no showing of surprise. The right is made absolute; thus in the case at bar, the trial Court violated the clear language of this Statute by its refusal to allow Appellant to introduce evidence of Mrs. Oldham's prior inconsistent statements.

In *Wyman v. Dunne* (1961) 83 Idaho 179, 359 P.2d 1010, the Idaho Supreme Court passed on the right of a party producing a witness to impeach his testimony by showing prior inconsistent statements. In addressing itself to this question, the Court held:

“The attempted impeachment occurred on the re-redirect examination. It consisted of showing to the witness written notes of statements purported to have been made by him to the plaintiff, Wyman, on July 8th after the making of the gift in

question. The writing purports to contain a statement by the witness to the effect that the deceased was 'not fully competent to fully grasp her business and affairs,' and 'not competent to handle business affairs.' Objection was made that the evidence offered was not proper re-redirect examination, and was an attempt to impeach the plaintiff's own witness without showing that the witness was hostile. There is no requirement that the party producing a witness must show that the witness is hostile before he may impeach the witness by showing that he has made statements inconsistent with his present testimony. I.C.A. Section 9-1207. The objection on that ground was not valid and should have been overruled. The same objection was made to a further offer of the same proof; but the objection that it was an attempt to impeach plaintiff's own witness without showing the witness to be hostile, was subsequently withdrawn." (83 Idaho 189.)

Similarly, in *Franklin v. Wooters* (1935) 55 Idaho 619, 45 P.2d 804, the Court held:

"Respondent called one Flemming as a witness and claiming surprise at his assertedly changed statements, was permitted by the trial court over appellant's objections to show under I.C.A., sec. 16-1207, contrary statements. Such course is clearly authorized by the statute and respondent did not transcend the proper limits permitted thereby. (*Price Produce & Commission Co. vs. Inter-Mountain Assn. of Credit Men*, 43 Ida. 540, 253 Pac. 854; *State vs. Cochran*, 7 Ida. 220, 61 Pac. 1034; *State vs. Gee*, 48 Ida. 688, 284 Pac. 845.)"

Based on these holdings, and the language of Section 9-1207, it appears to be obvious that an Idaho State Court, faced with similar facts, would have admitted evidence of Mrs. Oldham's prior inconsistent statements; particularly, where these statements were so crucial to Appellant's defense. The Federal Court is required to do likewise. Rule 43(a), Fed.R.Civ.P.

C. Under Federal Decisional Law a Party May Impeach His Own Witness Upon a Claim of Surprise.

There would appear to be little dispute that in the Federal Court a party may impeach his own witness if he claims surprise. See for example the following cases:

Bieber v. United States (9th Cir. 1960) 276

F.2d 709, 712-713;

United States v. Maggio (3rd Cir. 1942) 126

F.2d 155, 158-159;

Weaver v. United States (9th Cir. 1954) 216

F.2d 23, 25;

Stevens v. United States (9th Cir. 1958) 256

F.2d 619, 623;

Debardeleben v. United States (9th Cir. 1962)

307 F.2d 362, 363;

O'Shea v. Jewel Tea Co. (7th Cir. 1956) 233

F.2d 530, 535;

Journeymen Plasterers' Pro. & Ben. Soc. of

Chicago v. N.L.R.B. (7th Cir. 1965) 341 F.2d

539, 544.

And, the Courts do not require a strong showing a surprise. For example, in *United States v. Kahaner* (2nd Cir. 1963) 317 F.2d 459, the Court allowed im-

peachment upon a “modest showing of surprise.” This Circuit in *Bieber v. United States, supra*, held as follows:

“If the court is satisfied that the ‘surprise’ exists, either from the statement of counsel or otherwise, that is all that is required to permit the examination of the witness as to his prior contradictory statement.” (276 F.2d 712-713.)

In this case, this modest requirement was more than satisfied.

The record demonstrates that Mrs. Oldham had given a signed statement prior to the trial. In reliance on this statement, Appellant placed her on the witness stand and the record is clear that Appellant had received no information that the witness would change her testimony when under oath. The trial Court, in excluding this line of questioning, admitted as much when it said:

“The statement was given in September of 1963 and it seems to me that this was no surprise—there could be no surprise here. It might be, depending upon her saying what was in the statement, *but you could have known before she took the witness stand* whether she was going to say these things she did.” (R.T. 152.)

The evidence in the record was that Mrs. Oldham had talked to no one on behalf of the Appellant subsequent to the time that she gave her signed statement. (R.T. 147.) Thus, it is clear that the only basis for the trial court’s ruling was its belief that Appellant’s

trial counsel, by failing to interview the witness prior to trial and relying on her signed statement, could not claim surprise. (R.T. 96-97.) Such a holding is contrary to the language of the cases previously cited.

Directly in point on the duty to interview a witness prior to trial is the holding in *Stevens v. United States* (9th Cir. 1958) 256 F.2d 619, 621-623. In that case the argument was made that the failure to contact a witness prior to the trial precluded any claim of surprise. In rejecting this assertion the Court stated:

“Appellant raises the point that a witness cannot be impeached by the side calling him absent a real showing of surprise, and since the government made no attempt to contact this witness before the trial to check whether she would stand by her previous statement, they cannot now claim surprise as the basis for impeachment. The government replies that when it is under obligation to call all material witnesses it can impeach a witness’ adverse testimony, and that it had no reason to believe Mrs. Stevens’ statement would be different from her prior statements.

* * *

And although some of the older cases would require the government to investigate prior to trial before claiming surprise, such a rule seems entirely inconsistent with the processes of truth ascertainment (see McCormick, Evidence Section 39) and an undue imposition on the government where they reasonably rely on the prior statements as the truth, to which the witness will again testify (*Weaver v. United States*, 9 Cir., 1954, 216 F. 2d 23, 25). Thus we conclude that no error

was committed by the trial court in the exercise of its discretion in permitting impeachment of the government's own witness under the circumstances of this particular case.

“Being a hostile witness, it was proper to impeach Mrs. Stevens. The best way in which this could be accomplished was by proof of prior inconsistent statements. This made admissible for purposes of impeachment the notes written by one of the F.B.I. agents at the time the conversation with Mrs. Stevens was had, which detailed the conversation.

“The objection made to Exhibit 11's admissibility was that it was ‘incompetent, immaterial, irrelevant, and hearsay as to the defendant.’ It was competent, it was material, and it was relevant. It was hearsay as to the defendant to the extent it tended to prove the fact of the matter asserted, that is, defendant's conduct with reference to the Wallace trip. It was inadmissible as substantive evidence. But it was admissible to impeach the hostile witness. *Weaver v. United States*, supra; *Meeks v. United States*, supra.”

Logic and reason dictate that a similar result follow in this case.

Equally pertinent is the holding in *Weaver v. United States* (9th Cir. 1954) 216 F.2d 23. In that case this Circuit stated:

“She had talked to agents of the Federal Bureau of Investigation previous to the trial, and according to them had turned over to them a diary, which she told them stated facts, and also letters, which she said she had written to Weaver.

“When, on the stand, she denied that she had used the ticket he had sent her to go back to Los Angeles, and denied that she had ridden with him upon the bus and upon the plane, and denied that he knew that she was giving him the proceeds of prostitution, the United States moved for the opportunity to impeach her, claiming surprise. The defense claimed there was no surprise because the witness had refused to testify in accordance with her previous story to government agents when she was before the grand jury. The government, however, had a right to anticipate that, under oath and in court, she would testify in accordance with her story to the Federal Bureau of Investigation. *United States v. Graham*, 2 Cir., 102 F.2d 436, 442.” (216 F.2d 25.)

Appellant respectfully submits that it was absolutely essential for it to introduce the prior impeaching statements of Mrs. Oldham and that the error of the trial Court in refusing to permit their introduction was prejudicial and requires that this case be returned to the trial Court for a new trial.

V. THE TRIAL COURT ERRED IN REFUSING TO ADMIT INTO EVIDENCE PLAINTIFF'S EXHIBIT NO. 10, AS IT WAS PROPERLY ADMISSIBLE AS A RECORD OF PAST RECOLLECTION.

Appellant had marked for identification a two-page written statement bearing the signature of Betty Oldham, marked as Exhibit 10. As is set forth above in this Brief, under the Specifications of Error II, which quotes at length from the transcript (pages 49 through 51), Mrs. Oldham read the statement to herself, stat-

ing that she gave the statement to a Mr. Kennedy, that she was at that time telling the truth, that she had the statement read to her and that she signed it. Present at the time were Mr. Kennedy, Mr. Worth Jardine, Chief of Police of the Village of Arco and Mr. Ben Johnson, Sheriff of Butte County, State of Idaho. She was questioned concerning the facts set out in the statement and she repeatedly answered that she did not remember the evidence recited therein. (R.T. 51; 53-54.) Thereupon Appellant offered in evidence Exhibit 10 urging its admissibility on the grounds, among others, that it was a record of past recollection and therefore admissible as evidence. The Court reserved its ruling, but eventually ruled the Exhibit inadmissible. (R.T. 283.)

Appellant respectfully submits that this ruling was error. The proper foundation for the admissibility of the signed statement as evidence of past recollection recorded had been laid—the writing was made shortly after the occurrence; the witness recalled giving the statement; she was telling the truth at the time she made the statement, and that now, even after reading the statement, she could not recall the facts concerning which questions were asked—and its admission was extremely material and pertinent to the case.

The use of the doctrine of past recollection recorded has been generally accepted in this country.

A general summary is set out in 58 Am.Jur. 328, Witnesses, Section 588, which in part is as follows:

“* * * Gradually, however, the doctrine of the use of records of the past recollection of the wit-

ness has developed until, with perhaps the exception of one or two jurisdictions, it has come to be the generally accepted rule in this country that upon laying a proper foundation to establish the identity and authenticity of the writing in question, a witness may use a memorandum of a past transaction to refresh his memory or, more accurately speaking, may testify therefrom, although he has no independent recollection of the facts or circumstances, and although a consultation of the writing fails to recall a distinct recollection of the circumstances to his memory; it is sufficient if he testifies that he once knew the facts and that a memorandum of them, which he knew to be correct, was made at the time or soon after they occurred. The rule is not subject to the objection that the evidence is hearsay where the memorandum was made by the witness or under his direction. Nor is it subject to the objection that the witness who vouches for the record cannot be properly cross-examined, since as to accuracy of the witness's recollection—the only phase of cross-examination that cannot be gone into—all that could be brought out is shown by the statement that the witness has no present recollection. And generally, the record is itself admissible in evidence in connection with the testimony of the witness. The reason for this rule has been said to be one of necessity.”

The question of use of a written statement was presented to the Arizona Supreme Court in the case of *Kinsey v. State* (1937) 65 P.2d 1141, and the Court stated that where a witness, after reading the memorandum, is still unable to recall the facts but testifies

as to the correctness of the memorandum when it was written, then the memorandum itself becomes admissible. The Court is quoted as follows, beginning at page 1148:

“* * * And this view was somewhat elaborated upon in *State v. Easter*, 185 Iowa, 476, 170 N.W. 748, 749, as follows: * * *

“‘One may be called as a witness who cannot recall the matter about which he is called to testify. He may not be able to refresh his memory so that he is repossessed of the fact, but it may be made to appear that at some time in the past he had a personal knowledge of the fact, and made a record of it. If then he is able to say that he made the entry, or caused it to be made, and at the time it was his purpose or duty to record the fact as it then existed, the record becomes a competent witness, not because it is a record of an event, but because it speaks the past knowledge of a witness to a fact occurring within the knowledge of the witness, truthfully recorded.’

“Notwithstanding this very forceful and logical reasoning, the American authorities are in hopeless conflict upon the question whether a past recorded recollection of events in general is admissible, but a majority, and we think the better considered, opinions, in civil cases at least, uphold the rule of the admissibility of such memoranda of past recollection recorded when the witness who made them or under whose direction they were made testifies (a) that he at one time had personal knowledge of the facts, (b) that the writing was, when made, an accurate record of the event, and (c) that after seeing the writing, he has not sufficient present independent recol-

lection of the facts to testify accurately in regard thereto. 70 C.J. 595-598, and notes.”

In the case of *Putman v. Moore* (5th Cir., 1941) 119 F.2d 246, the rule is stated as follows:

“The general rule, long recognized, is that a witness may use a memorandum that he knows to be correct to refresh his recollection. Obviously, in many cases the witness has no recollection, refreshed or otherwise, of the original transaction. When he testifies he is doing so solely on the faith of the correctness of the memorandum. The rule permitting use of memoranda in aid of oral testimony has been very much broadened in recent years. Wigmore divides the subject into past and present recollection and discusses it fully in his third edition, Section 726 et seq. The modern doctrine is to permit a witness to testify as to past transactions from a memorandum that he knows was accurate at the time it was made, although he has no recollection whatever of the original transaction. This finds support in the following Texas cases: *Payne v. Texas Mercantile Co.*, Tex. Civ. App., 248 S.W. 79; *Fire Ass’n of Philadelphia v. Nami*, Tex.Civ.App., 77 S.W.2d 260; *Southern Pacific Co. v. Cox & Co.*, Tex.Civ.App., 136 S.W. 103; *St. Louis Southwestern Ry. Co. of Texas v. Mitchell*, Tex. Civ. App., 127 S.W. 876; *Kansas City Southern Ry. v. Rosebrook Josey Grain Co.*, 52 Tex. Civ.App. 156, 114 S.W. 436.”

In holding a statment admissible under such factual situations, the Court in *Asaro v. Parisi* (1st Cir. 1962) 297 F.2d 859, at page 863 states:

“Subsequently, as part of his case, counsel for the defendant put one of his employees named

Cote on the stand who testified that he had interviewed the plaintiff after the accident and had written down what the plaintiff told him but not in the plaintiff's exact words. This witness was allowed without objection to read the statement to the jury, but counsel for the plaintiff objected when the court admitted the statement into evidence as an exhibit. The record is not altogether clear but it would appear that the statement was admitted into evidence as a record of the witness's, Cote's, past recollection, he having testified that while he remembered interviewing the plaintiff he had no independent recollection of what the plaintiff had said. On this ground the statement is admissible in evidence as proof of what the plaintiff had said to Cote and hence to establish the foundation for its use on cross-examination of the plaintiff as a prior contradictory statement."

To this same effect see the following:

Ettelson v. Metropolitan Life Ins. Co. (3rd Cir.

1947) 164 F.2d 660, 666;

Jaeger v. Hackert (Iowa 1950) 41 N.W.2d 42;

State v. Gross (Wash. 1948) 196 P.2d 297;

United States v. Allied Stevedoring Corp. (2d

Cir. 1957) 241 F.2d 925, 931-933 (Good analysis by Judge Hand).

Section 9-1204, Idaho Code provides as follows:

"9-1204. Refreshment of memory.—A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew

that the same was correctly stated in the writing. But in such case the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So also a witness may testify from such a writing, though he retain no recollection of the particular facts, but such evidence must be received with caution. (R.S., R.C., & C.L., Section 6078; C.S., Section 8033; I.C.A., Section 16-1204.)”

And the proposition urged by Appellant is recognized in Idaho. *Albrethson v. Carey Valley Reservoir Co.* (1947) 67 Idaho 529; 186 P.2d 853. See also 82 A.L.R. 2d 537, 125 A.L.R. 165; *Gencarella v. Fyfe* (1st Cir. 1948), 171 F.2d 419; III Wigmore on Evidence (1940) Sec. 734, p. 64.

The contents of plaintiff's Exhibit No. 10 were extremely important to the defense of an incendiary fire. It directly contradicted Appellees' statements and placed Appellees in the vicinity of the fire shortly before it was discovered. Accordingly, the courts refusal to allow its admission prejudiced Appellant in its presentation of its defense, and requires a reversal of the judgment below.

CONCLUSION

Wherefore, it is respectfully submitted that the trial judge should have admitted Exhibit 10 in evidence, whereupon it would clearly be a question for the jury to determine as to the liability, if any, of the Appellees. The evidence of prior inconsistent statements

made by the witness Oldham should have been admitted for all proper purposes to impeach that witness under the claim of surprise.

Further, even without Exhibit 10, and without the other evidence refused by the trial Court, the facts in the record present a jury question on liability as to whether or not there was an incendiary fire and whether or not the Appellees were responsible for it. It necessarily follows that the record in this instance is such that a directed verdict was improper.

Judgment of the trial Court should be reversed and the case returned for a new trial.

Dated, November 24, 1965.

Respectfully submitted,

AUGUSTUS CASTRO,

MERRILL & MERRILL,

Attorneys for Appellant.

CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the 9th Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

AUGUSTUS CASTRO,

By PAUL A. RENNE.

(Appendix Follows)

Appendix.

Appendix of Exhibits

Plaintiff's Exhibit No.	Description	Page
1	Insurance Policy, Hartford Fire Insurance Company	
2	Statement in proof of loss of O. T. and Ruby I. Jones	
3	Photograph: No. 3 apartment	
4	Photograph: Rear view of motel	
5	Photograph: Front view of motel	
6	Photograph: Motel Unit No. 4	
7	Photograph: Motel Unit No. 3	
8	Photograph: Motel Unit No. 2	
9	Photograph: Motel Unit No. 1	
10	For Identification statement of Betty Oldham	
11	Container with rug, curtains, and plastic items taken from Motel	
12	Registration card, Mr. O. T. Jones dated June 10, 1963	

No. 20,323

United States Court of Appeals

For The Ninth Circuit

Hartford Fire Insurance Company
a corporation,

Appellant,

vs.

O. T. JONES and RUBY I. JONES,

Appellees.

APPELLEE'S BRIEF

ALBAUGH, BLOEM, SMITH
& PIKE

Attorneys for Appellees

Idaho Falls, Idaho

FILED

JAN 22 1966

WILLIAM E. WILSON, Clerk

SUBJECT INDEX

	Page
Statement of pleadings	1
I. Jurisdiction of the court	1
II. Pleadings	2
A. Complaint in declaratory relief	2
B. Answer	3
C. Cross-complaint	4
D. Answer to Cross-complaint	4
Statement of the Case	5
Summary of Argument	9
Argument	13
I. Idaho Rules of law applicable	13
A. Idaho Rules on Motions for Directed verdicts	13
B. The Idaho Rule Governing proof of facts by circumstantial evidence	15
II. Incendiary Fire	16
III. Evidence was not sufficient to sustain verdict that Appellees wilfully caused the fire	16
A. No proof of opportunity to set the fire	17
B. The motel could be readily entered by third parties	18
C. There was no substantial motive shown on the part of Appellees	19
D. Conduct and statement of Appellees did not tend to show guilt or guilty knowledge on their part	20
IV. It was not error to deny Appellant the right further to impeach its own witness, Betty Oldham	23
V. The statement of Betty Oldham, Exhibit No. 10, was not admissible as a record of past recollection	28
Conclusion	31

Cases	Page
Agaleanos v. American Cent. Ins. Co., 62 Cal. App. 349 217 Pac. 107, 113	26
Alsup v. Saratoga Hotel, 71 Idaho 229, 229 P. 2d 985	13
Bodenhamer v. Pacific F. & P. Co., 50 Idaho 248 295 Pac. 243	25
Byington v. Horton, 61 Idaho 389, 102 P. 2d 652 (1940)	14
Dent v. Hardware Mutual Casualty Co., 86 Idaho 427 288 P. 2d 89	16-21
Ford v. Connell, 69 Idaho 183, 204 P. 2d 1019	13
Hale v. Henninger, 87 Idaho 414, 393 P. 2d 718	14
Nissula v. Southern Idaho Timber Protective Ass'n., 73 Idaho 37, 245 P. 2d 400 (1952)	15
People v. Floyd, 78 Cal. App. 11, 247 Pac. 917	26
Shaffer v. Adams, 85 Idaho 258, 263-264, 378 P. 2d 816 818 (1963)	14
Smith v. Big Lost River Irrigation District 83 Idaho, 374 364 P. 2d 146 (1961)	15
Splinter v. City of Nampa, 74 Idaho 1, 256 P. 2d 215 (1953)	14-15
Stevens v. United States (9th Cir. 1958) 256 F. 2d 619	27
Sturgis v. Garrett, 85 Idaho 364, 379 P. 2d 658 (1963)	15
Thomas v. Hinton, 76 Idaho 337, 281 P. 2d 1050	14
Wurm v. Pulice, 82 Idaho 359, 353 P. 2d 1071	27

Codes

Idaho Code:

C.S. Section 8036	25
Section 9-1207	27
Title 28, U.S.C.A.:	
Section 1332	2
Section 1391	2
Section 2201	2
Section 2202	2

Rules

I.R.C.P., Rule 41 (b)	15
-----------------------	----

Texts

38 Am. Jur. 1046, Section 345	14
95 A.L.R., Subd. III PP. 181-192	16
6 Jones, Evidence 2d ed., P. 4812	26

No. 20,323

United States Court of Appeals

For The Ninth Circuit

Hartford Fire Insurance Company
a corporation,

Appellant,

vs.

O. T. JONES and RUBY I. JONES,
Appellees.

APPELLEE'S BRIEF

STATEMENT OF PLEADINGS

I. Jurisdiction of the Court.

Appellant has appealed from that portion of a judgment directing a finding of liability against appellant after a trial in the United States District Court for the District of Idaho, Eastern Division, before the Honorable Fred M. Taylor, District Judge, in an action in declaratory relief to determine the rights, liabilities, duties, responsibilities and legal relationship of the parties under the provisions of a policy of fire insurance issued by Appellant.

Jurisdiction of the cause below was founded on diversity of citizenship and amount in controversy, pur-

suant to sections 1332, 1391, 2201 and 2202, Title 28, United States Code.

The pleadings show that defendants, O. T. Jones and Ruby I. Jones, each was a citizen of the State of Idaho, while plaintiff, Hartford Fire Insurance Company (hereinafter "Hartford") was a corporation organized under the laws of Connecticut, with its principal place of business in Connecticut and authorized to conduct insurance business in the State of Idaho; the matter in controversy exceeds, exclusive of interest and costs, the sum of \$10,000.00 (C.T. pp. 3-4, 6-32, 37, 47.) ¹

(¹ "C.T." refers to clerk's transcript of record designated as Volume 1 in this record on appeal.)

II. Pleadings.

The pleadings consist of a complaint in declaratory relief filed by Appellant; Answer and Cross-Complaint filed by Appellees, and Answer to Cross-Complaint filed by Appellant. (C.T. 3-17)

A. Complaint in declaratory relief.

In its complaint in declaratory relief Appellant, Hartford,, alleged its corporate existence under the laws of Connecticut and its authority to conduct an insurance business in the State of Idaho. It alleged that Appellees were the owners of a motel building situated one and one-half miles west of Arco, Idaho and all the personal property located therein with the exception of some personal property located in one unit of the motel; execution of a standard Idaho fire insurance policy insuring Appellees against loss by fire to said motel up to a limit of liability of \$28,000 and loss by fire to personal property located therein up to

a limit of liability of \$7,000, with a lender's loss payable endorsement, making the loss payable first to the Standard Insurance Company, as its interest may appear; that on June 11, 1963 the motel and personal property were wilfully set on fire, and receipt of a sworn statement of Proof of Loss executed by Appellees wherein they claimed the sum of \$21,212 as building loss and the sum of \$5,000 for loss of personal property. It further alleged upon information and belief that Appellees entered into a conspiracy to defraud Appellant by wilfully causing said fire and filing a false and fraudulent sworn statement of proof of loss; that pursuant to said conspiracy, Appellees wilfully caused the fire, and filed a false and fraudulent proof of loss wherein they denied knowing the cause of the fire; that they had done nothing to violate the conditions of the policy or attempt to deceive the company, and that Appellees overstated the amount of loss and damage; that Appellees had violated provisions of the policy relating to Concealment, Fraud, duty of insured to save and preserve the property, and increase hazards; that the actual cash value and amount of loss was substantially less than that claimed by Appellees; that an actual dispute and present controversy existed in as much as Appellant contends that it was under no obligation to pay any insurance proceeds to Appellees by virtue of said violations and the fraudulent conspiracy. Appellant additionally contended that it should be indemnified by Appellees for any amount Appellant was obligated to pay to said loss payee, Standard Insurance Company. (C.T.PP.3-6)

B. Answer.

In their answer, Appellees admitted all the allegations of the complaint, except they denied wilfully

causing said fire, denied violating the provisions of the policy, denied filing a false and fraudulent sworn statement in proof of loss, and denied all allegations of conspiracy and all knowledge as to the cause of the fire. They alleged that if said fire was wilfully caused by some person said loss was still covered under the terms of the policy and that a dispute and controversy existed because Appellant refused to pay the amount due under the terms of the policy. (C.T. pp. 8-9).

C. Cross-Complaint.

In their cross-complaint, Appellees realleged the facts as to citizenship, amount in controversy; ownership of the property subject only to the interest of a mortgagee, Utah Mortgage Loan Company; existence of a standard Idaho fire insurance policy with the terms and limits as set forth in the complaint which was in effect on the date of the fire; the fact of fire; timely filing of a sworn statement in proof of loss; compliance with all covenants and conditions of the policy, demand for payment in the amount of \$30,000 and \$2,000 as attorney's fees, and failure to pay (C.T. pp.11-13.)

D. Answer to Cross-Complaint.

In its answer to the Cross-Complaint, Appellant admitted the allegations as to citizenship; the existence of a standard Idaho fire insurance policy; the fact of fire; receipt of the sworn statement in proof of loss filed by Appellees and demand for payment and refusal by Appellant. All other allegations were denied, either specifically or because of insufficient knowledge or information on the part of Appellant. Appellant further re-alleged, re-adopted and re-affirmed the allegations contained in its complaint in declaratory

relief as an affirmative defense to Appellees' cross-complaint. (C.T.pp.14-16.)

STATEMENT OF THE CASE

This is an action on an Idaho standard form fire insurance policy with endorsement covering vandalism and malicious mischief (Ex. 1). Appellant contended that Appellees conspired to defraud Appellant by setting the fire and then submitting a false proof of loss. Appellant further contended that Appellees, having set the fire, were guilty of fraud, concealment, and false swearing as to material facts and circumstances.

Appellees denied that they set the fire, or had any knowledge concerning its origin, and denied any and all concealment, fraud or false swearing. Appellees did not take issue with Appellant's contention that the fire was of incendiary origin since the Appellees had no knowledge concerning its origin. Appellees did contend that they were entitled to recover their losses even though the fire were of incendiary origin.

About 2:05 A.M. on June 11, 1963, the Arco Fire Department received a call for a fire at the Motel owned by Appellees, Mr. and Mrs. O. T. Jones. (R.T. 14) . ("R.T." refers to reporter's transcript designated as Volume 2 in this record on appeal). The fire appeared to have been of incendiary origin, or a "set fire", since the electric stoves were in the "on" position in all apartments, fires apparently started independently in all four apartments, and petroleum products had apparently been applied to cloth and rugs in the apartments to spread the fires. Mr. Steve Kennedy, Special Agent for the National Board of Fire Underwriters and a witness for Appellant testified at length

he had investigated this fire and that it was in his opinion a "set fire". Appellees did not take issue with this opinion in any particular.

The fire was intense when the firemen arrived at the scene. The motel was greatly damaged by the fire which took three hours to extinguish. (R.T. 18.)

The motel consisted of four separate living units. One unit was rented at the time of the fire, but the tenant was apparently not in Arco on the night of the fire. (R.T. 109.) He had a key to apartment number 2. (R.T. 109).

The apartments each had separate outside entrances and were not connected by doors. The two center units had windows on the front and rear walls; the end units had windows on the side as well as the front and rear. (R.T. 168-169.) In the ceiling of each unit there was a covered opening or "crawl hole" which led into a common attic. The openings were approximately eighteen by twenty six or thirty inches in size and large enough for a person to crawl through (R.T. 32.) At the time of the fire at least three of the holes were "open" into the attic. Because the ceiling had fallen into the fourth apartment it could not be determined whether that hole was open (R.T.31). The crawl holes were designed for persons to enter the attic from each apartment, and having entered the attic, a person had unobstructed access to each unit through the "crawl holes". (R.T. 31, 32, 33.)

When the firemen arrived at the scene a window on apartment number four, at the opposite end of the motel from the highway, was found to be unlocked. It was about chest high from the ground and large enough to crawl through. In fact the assistant fire chief was "going to crawl into it" when the chief told

him it was unnecessary. A can or kettle to stand on was found upside down under the window. (R.T. 34, 35, 77.) Each apartment contained chairs, a dresser and a chest of drawers making access to the "crawl holes" quite easy. (R. T. 186, 207.)

After the fire it was discovered that a refrigerator, bed, and metal springs were missing from apartment number three, and a ladder, metal bed, and other items were missing from apartment number one. They were never found. (R.T. 210,211.)

After the fire empty beer bottles and whiskey bottles were found in the motel (R.T. 35, 38, 39), although the Appellees do not drink (R.T. 205) and the bottles were not there the last time Mrs. Jones was in the motel before the fire (R.T. 205). On Saturday, June 8, 1963, Appellee, Mrs. Ruby Jones was in the motel cleaning it and getting it ready for tenants who had contracted to rent the unoccupied units the last of June. (R.T. 203,204.) This was the last time she was in the motel prior to the fire (R.T. 203.)

On June 10, 1963, Appellees left Arco on business for Jerome and Caldwell, Idaho, (R.T. 170-171.) They spent the afternoon and evening in Jerome and Wendell and then drove to Shoshone, Idaho, arriving there about eleven (R.T. 175-176.) They stayed at a motel in Shoshone that night, retiring about midnight (R.T. 176-178.) They left the next morning for Caldwell, Idaho, arriving there about eleven in the morning. There they learned of the fire, their daughter having phoned earlier to a business client there. (R.T. 179.) They had intended to visit in Caldwell, but upon learning of the fire, drove back to Arco the same day, arriving about six-thirty in the evening (R.T. 180.)

Upon arriving at Arco they found the motel "board-

ed up" and were told by a man who was "boarding it up" that he was ordered to keep everybody out (R.T. 181). The insurance adjuster for Appellant had ordered the motel "boarded up" (R.T. 70). Appellee, Mr. O. T. Jones, telephoned the insurance adjuster (R.T. 78,181) and he contacted the sheriff and the chief of police and his attorney who went with him into the motel two days after the fire (R.T. 182).

Appellees had lived in Arco twenty-six years; and they had raised four children (R.T. 155). Appellee Jones had been a licensed auctioneer for twenty-six years, and a licensed real estate broker for twenty-one years (R.T. 156). For fifteen years he had been an agent for the Utah Mortgage Loan Company. He was, at the time of the fire, a man of quite substantial means, having a net worth of about \$98,000.00 (R.T. 162). Although he had several financial obligations practically all his debts were in a current condition. (R.T. 157-165).

The motel and furniture were not insured for substantially more than their value and the insurance adjuster for Appellant was present and helped Appellees compute their loss at the time the proof of loss was made out. (R.T. 79, 185.)

Appellee had had three fire losses prior to the one of June 11, 1963. There was a loss in approximately 1937 in Blackfoot, but apparently there was no insurance covering the loss. (R.T. 126). About 1960 a fire had occurred in a potato cellar while in the possession of Appellees' tenant (R.T. 130). And about 1953 a fire had occurred in the same motel. No money had been paid to Appellees, but the motel had been restored by the insurance company (R.T. 121, 122.)

Appellees at the close of all the evidence moved

the court for a directed verdict as to the issue of liability, which was granted as to that issue. Appellants appeal from the order granting the directed verdict and upon rulings of the court as to the admissibility of certain testimony and a written statement of Appellant's witness, Betty Oldham.

SUMMARY OF ARGUMENT

In Appellees' Argument each issue and specification of error argued by Appellant will be treated by Appellees, as far as possible, in the same order as treated by Appellant.

Appellees are not taking issue with appellant's contention that the fire was of incendiary origin, nor did they at the trial. Therefore this issue will merely be commented upon.

Appellees contend that there was no evidence adduced at the trial which would prove, or tend to prove, that Appellees, or either of them set the fire, conspired to set it, or in any manner caused it to be set. Appellees further contend that there was no evidence which would prove, or tend to prove, fraud, concealment, filing of a false proof of loss, or any other violation of the policy.

Appellees recognize that circumstantial evidence can be the basis of proof in a civil case involving an incendiary fire, but Appellees contend that Appellant fell far short of presenting a case upon which the triers of the fact could properly infer that Appellees were guilty of setting this fire, or causing it to be set. Of course, if Appellees were not guilty as to the setting of the fire, they were not guilty of the other charges.

No evidence was adduced that either of the Appellees

was within ninety miles of the motel when the fire was set, and certainly there was no evidence adduced that Appellees conspired with others to set the fire. The only evidence bearing upon Appellees' whereabouts when the fire was set placed them in Jerome, Idaho, and Shoshone, Idaho, over ninety miles from the motel.

No evidence was adduced at the trial in any manner connecting Appellees with the inflammable liquids, rags, and other properties apparently used to set and spread the fire.

No evidence was adduced at the trial tending to show that Appellees were the only persons who had access to the motel units. In fact much evidence was adduced by Appellant's own witnesses, and uncontradicted, that unknown persons could have readily gained access to all four units on the night of the fire.

And there were at least four facts established at the trial, and uncontroverted, that an unknown person or persons did enter the motel units on that night. It was proven that a bucket or kettle had been placed upside down under an unlocked window in the motel through which entrance could be rather readily gained to the fourth unit. It was proven that the covers to the ceiling openings in the units had been removed, thus affording access to all units through a common attic. It was proven that items of metal furniture had been removed from two apartments. It was proven that empty beer and whiskey bottles were found in an unoccupied apartment, although the apartment had been cleaned and inspected some two days before the fire.

In attempting to establish motive on the part of Appellees much evidence was adduced concerning the

financial circumstances of Appellees. However, Appellant succeeded only in showing that Appellee Jones was a man of diverse business interests who financed the purchase of much of his property and the conduct of his business activities, but who was substantially current in the payment of his obligations and who had a net worth of some \$98,000.00. He is a family man who has held responsible trusts for many years in his community, and certainly Appellant's proof did not establish motive for Appellees to commit arson under these circumstances.

Appellant contends that it was error not to permit Appellant to impeach its own witness, Betty Oldham, by introducing evidence of her prior inconsistent statements. Appellees contend that no foundation was laid justifying the admission of such impeaching evidence in that this witness' testimony was wholly negative and not in any way damaging to Appellant's case. The testimony of this witness neither helped nor harmed Appellant's case, and no surprise or prejudice was shown concerning it. Also Appellees contend that no amount of impeachment of this witness could have strengthened Appellant's case whatever for the reason that impeachment evidence cannot be received for the purpose of establishing the truth of anything contained therein, but solely for the purpose of discrediting the witness. No purpose could have been served by discrediting this witness further.

Plaintiff's Exhibit No. 10, the statement of the witness Betty Oldham, was not admissible in evidence because it was hearsay, not being made under oath, or subject to cross examination; nor did the witness testify that she knew the matters contained in the statement to be true, either at the time the statement was

made or at the time of trial. Therefore, the statement was inadmissible under any theory.

The Appellant had the burden of proof in establishing that Appellees set the fire. They failed to prove any of the elements necessary to establish guilt directly or by circumstantial evidence and failed to prove a *prima facie* case.

ARGUMENT

I. Idaho Rules of Law Applicable.

Appellees take no issue with Appellant's position that the Federal District Court shall apply the applicable State law governing questions of burden of proof, presumptions, sufficiency of evidence and interpretation of rights and obligations under the insurance policy, and Appellees urge that this is the law.

A. Idaho Rules on Motions for Directed Verdicts.

Appellees take no issue with Appellant as to the general rule governing the granting of directed verdicts in Idaho, except that the full rule is not stated in Appellant's Brief. It should be observed that directed verdicts in Idaho have been frequently granted when the undisputed evidence is so conclusive that reasonable minds could not arrive at different conclusions as to the facts or inferences to be drawn therefrom.

The full statement of the rule in Idaho governing the taking of a case from the consideration of the jury is contained in *Alsup v. Saratoga Hotel*, 71 Idaho 229, 229 P. 2d. 985. The Court stated:

"The rule is that where the minds of reasonable men might differ or where different conclusions might be reached, the question of negligence, contributory negligence and proximate cause, is for the jury. Where the facts are in dispute, it is the province of the jury, or trier of facts, to find on such conflicting evidence. *Ford v. Connell*, 69 Idaho 183, 204 P. 2d 1019. Conversely, where the undisputed evidence is so conclusive that reasonable minds could not arrive at different conclusions

as to the facts or inferences to be drawn therefrom, it is proper for the court to take the case from the jury. 38 Am. Jur. 1046, 345."

In a malicious prosecution case, *Thomas v. Hinton*, 76 Idaho 337, 281 P. 2d. 1050, the Idaho Court stated the rule as follows:

"The establishment of a prima facie case of want of probable cause does not shift the burden of proof to the defendant in the action, nor does it make the question one of sufficiency or weight of the evidence so that the trial court cannot take the case from the jury and enter judgment for the defendant (appellant) as a matter of law, if the evidence is so clear and undisputed that all reasonable minds must reach the same conclusion therefrom."

In a recent malpractice case, *Hale v. Henninger*, 87 Idaho 414, 393 P. 2d. 718, the grounds for granting a directed verdict were stated as follows:

"On the basis of the testimony above discussed, we are constrained to the view that reasonable and fair-minded men could not have differed as to the inferences and conclusions to be drawn therefrom, *Splinter v. City of Nampa*, 74 Idaho 1, 256 P. 2d 215 (1953); *Byington v. Horton*, 61 Idaho 389, 102 P. 2d 652 (1940) and that the trial court was correct in granting respondents' motions for a directed verdict. The evidence presented by appellant was insufficient, as a matter of law, 'to establish his entitlement to recovery under any view which could be properly taken of the evidence.' *Shaffer v. Adams*, 85 Idaho 258, 263-264, 378 P. 2d 816, 818 (1963); *Smith v. Big Lost River Irrigation*

District, 83 Idaho 374, 364 P. 2d 146 (1961) ; I.R.C. P. 41 (b) ; *Sturgis v. Garrett*, 85 Idaho 364, 379 P. 2d 658 (1963) ; *Nissula v. Southern Idaho Timber Protective Ass'n.*, 73 Idaho 37, 245 P. 2d 400 (1952)."

In the trial court Appellant had the burden of proof on the issue that Appellees had set the fire, or caused it to be set. Under the above rules, when at the close of all the testimony, there was not any competent evidence adduced which tended to prove, either directly or indirectly, that Appellees had set the fire, or caused it to be set, the court properly took this issue from the consideration of the jury.

It is important to observe that had all the testimony of Appellees been disregarded, there is still a complete failure in the evidence to connect Appellees with the setting of the fire.

B. The Idaho Rule Governing Proof of Facts by Circumstantial Evidence.

The Idaho Court has apparently never been called upon to decide a case directly in point, involving determination of the origin of a fire in a case where the proof consists of circumstantial evidence.

In *Splinter v. City of Nampa*, 74 Idaho 1, 256 P. 2d 215, the Court in a negligence case stated:

"Circumstantial evidence is competent to establish negligence and proximate cause. Facts, which are essential to a liability for negligence, may be inferred from circumstances which are established by evidence. But, where circumstantial evidence is relied upon, the circumstances must be proved, and not themselves be left to presumption or inference. This court has held that inference cannot

be based upon inference, nor presumption on presumption.

"The underlying principle applicable here is that a verdict cannot rest on conjecture; that where a party seeks to establish a liability by circumstantial evidence, he must establish circumstances of such nature and so related to each other that his theory of liability is the more reasonable conclusion to be drawn therefrom; and that where the proven facts are equally consistent with the absence, as with the existence, of negligence on the part of defendant, the plaintiff has not carried the burden of proof and cannot recover."

Again, in *Dent v. Hardware Mutual Casualty Co.*, 86 Idaho 427, 388 P. 2d. 89, a suit on an insurance policy, the Idaho Court reaffirmed the above rules governing the proof of facts by circumstantial evidence and called attention to Anno. 95 A.L.R., Subd. III, PP 181-192.

II. Incendiary Fire.

There will be no issue taken by Appellees as to Appellant's contention that the fire was of incendiary origin. Appellant's agents had boarded up the motel before Appellees returned from their trip, and Appellees had no real opportunity to form an opinion as to the origin of the fires. It must be conceded that there was ample evidence adduced at the trial to establish the incendiary nature of the fire.

III. Evidence was not Sufficient to Sustain Verdict that Appellees wilfully caused the Fire.

There is no doubt that circumstantial evidence, when sufficient, may establish the identity of the person setting an incendiary fire. The circumstances which are

generally held to be relevant are: Opportunity; exclusive access to the premises; motive; and statements and conduct tending to connect the person with the arson.

Appellees contend that none of those circumstances were themselves proven according to the rules governing circumstantial evidence as laid down in the case of *Splinter v. City of Nampa*, *Supra*.

A. No proof of opportunity to set the Fire.

The last time either of the Appellees were in the motel prior to the fire was Saturday, two days before the fire. (R.T.203). Mrs. Jones was then cleaning the apartments for occupancy by tenants who had contracted to take three of the apartments at a later date. (R.T. 203). Mr. and Mrs. Jones left on a business trip, about 11:00 A.M., Monday, June 10, having business in Jerome, Idaho and vicinity and Caldwell, Idaho. (R.T. 212). They returned to Arco, Idaho, where the motel was located about seven in the evening of June 11, (R.T.215) The motel had burned in the early morning hours of June 11 while Appellees were in a motel in Shoshone, Idaho, approximately ninety miles from Arco. The fact that Appellees were doing business in Jerome and Wendell, Idaho, from about noon on June 10 until about 10:00 or 10:30 P.M. on that date was testified to by Eldon Handy, a real estate broker, (R.T. 225-228) his wife, (R.T. 235-236), and a Laura Hope (R.T. 230-233). On June 10, 1963,, Appellees registered for night lodging at a motel in Shoshone, Idaho (R.T. 257). They were assigned the last unit available in the motel (R.T. 260). The registration card (Plaintiff's Ex. No. 12) did not have the time of registration filled in (R.T. 262). Mrs. Young, the owner of the motel, testified that Appellees registered at between five and five-

thirty P.M. of June 10 (R.T. 258). Appellees testified that they registered for the night at the motel after finishing their business with Mr. Handy at about 11:00 P.M. (R.T. 177). It is submitted that this is the only substantial conflict in the evidence adduced at the trial. The owner of the motel testified that she saw the vehicle of Mr. Jones parked at their rented unit at about seven in the morning following their registration, (R.T. 261) and the motel apartment had been used. (R.T. 266). Appellees left the motel at about seven in the morning and drove to Caldwell, Idaho.

There is no evidence in the record whatever which tends to prove that Appellees, or either of them, were in the vicinity of Arco, Idaho, between the morning of the 10th of June and the afternoon of the 11th of June. The unimpeached testimony of several witnesses corroborates the testimony of Appellees that they were not nearer than ninety miles from Arco during any of that time.

Appellant's witness, Betty Oldham, testified that she "might have" seen a red and white Ford parked near her home on the night of the fire (R.T.43), but she was quick and steadfast in explaining that she did not know whether one was there or not. The testimony of this witness was wholly negative and added nothing to Appellant's case.

B. The Motel Could Be Readily Entered By Third Parties.

Perhaps the most important circumstance in any arson case linking the insured with the fire is his exclusive means of access to the premises. A careful review of the cases reveals that this circumstance is frequently the controlling element of proof. However, in the case at bar it was proven rather conclusively

that third persons could readily enter all apartments by way of an unlocked window, and indeed, it appeared they had. The Fire Chief and the insurance adjustor both testified that a can or kettle was found upside down under the unlocked window (R.T.34, 35, 77). Once a person had entered through the window, he could gain access to all four apartments (R.T. 31, 32, 33). Evidence of theft from the motel was adduced; (R.T. 210,211) and empty beer bottles and whiskey bottles were found in the motel after the fire (R.T. 35, 38, 39).

It would appear, then, that the evidence sustains the theory of access and entry by unknown persons just as readily as it sustains access by the Appellees.

C. There was no Substantial Motive shown on the Part of Appellees.

Appellee Jones was a family man of substantial means and had many varied business interests. He held many positions of trust, and owned several parcels of real estate. He had been licensed both as a realtor and an auctioneer for many years, and he was an agent for a mortgage loan company. Much effort was devoted at the trial by Appellant in an effort to discredit his financial statement, but with little success. Mr. Jones had collected on two fire losses in some twelve years. A fire had occurred in the same motel in 1953. No money had been paid to Appellees, but the motel had been restored by the insurance company. (R.T. 121, 122). No evidence was adduced in any manner casting any suspicion upon the bona fides of these fire losses.

When the evidence concerning Appellees' background and business activities is reviewed, it is hard to imagine any persons having a lesser motive than Appellees for committing the crime of arson.

The fire insurance policy had been obtained in October, 1961. (R.T. 291). The fire did not occur for more than a year and a half later. The amount of the insurance was not disproportionate to the value of the property insured.

D. Conduct and Statements of Appellees Did Not Tend To Show Guilt or Guilty Knowledge on their Part.

Appellant thoroughly investigated this case even to employing a Special Agent of the National Board of Fire Underwriters, yet no inconsistency was ever found in the conduct or statements of Appellees, and no substantial conflict appeared in the evidence. Appellant contends that there was something strange about Appellee's conduct in remaining for about an hour in Caldwell after learning of the fire and in stopping in Shoshone on the way home to pick up a receipt for the motel expense. Appellees had just driven some two hundred miles from Shoshone to Caldwell (R.T. 178). They stayed in Caldwell only about an hour (R.T. 180) and "headed right back to Arco" although they had intended to transact some business and to go fishing (R.T. 214). There was nothing about the motel situation by the time they heard about the fire that could be helped by speeding up their trip home, although they arrived in Arco at about 7:00 P.M., having driven some two hundred ninety miles from Caldwell that afternoon. Also there was nothing strange about a business man stopping to pick up his receipt for income tax purposes. Mr. Jones explained how he had happened to miss picking up the receipt the night before (R.T. 178).

Appellant implies that it was a suspicious circumstance that Mr. Jones called his attorney. Actually it

would have been strange had he not done so under the circumstances. The insurance agent boarded up the motel without any authority from the owners before they arrived and left word that the owners were not to enter. (R.T. 72-75). Mr. Jones called the insurance adjuster about the same time he called his attorney, and Mr. Jones was complaining bitterly of the treatment he was receiving. (R.T. 78).

If there was any strange or suspicious conduct, it was on the part of the insurance adjuster. The insurance adjuster actually helped Appellee fill out his proof of loss, and then Appellant charged Appellees with fraud in connection with the proof of loss at the trial.

At the close of all the evidence the court was called upon to decide whether or not Appellant had presented sufficient evidence tending to prove that Appellees wilfully set the fire and defrauded Appellant to permit the issue to go to the jury. The Court followed the law of Idaho governing the proof of facts by circumstantial evidence and had to conclude that the evidence was wholly insufficient to sustain a verdict against Appellees.

The Court was mindful of the case of *Dent. v. Hardware Mutual Casualty Co.*, 86 Idaho 427, 388 P. 2d 89, wherein the Court lays the rule down in these words:

“The underlying principle applicable here is that a verdict cannot rest on conjecture; that where a party seeks to establish a liability by circumstantial evidence, he must establish circumstances of such nature and so related to each other that his theory of liability is the more reasonable conclusion to be drawn therefrom; and that where the

proven facts are equally consistent with the absence, as with the existence, of negligence on the part of defendant, the plaintiff has not carried the burden of proof and cannot recover. (Citations).

“Where it remains equally probable from a consideration of all the evidence, that the injury resulted from the cause suggested by the defendant, as from that suggested by the plaintiff, the plaintiff has not established his case.”

Mindful of the substantive law of Idaho concerning the requirements of proof in circumstantial evidence cases, the Court addressed himself to the motion for directed verdict on liability (R.T. 288) as follows:

“I will have to admit there is evidence in the record which might cause somebody to suspect something. It is like charging somebody with a crime. There is the suspicion and here the insurance company has done just that, but in the opinion of the court there is no evidence in the record which would connect these defendants with setting the fire. There may be some circumstances which might cause somebody to question whether they were at a certain place at a certain time, but as to the liability question, I don't think the insurance company has shown that these people had anything to do with setting the fire. The evidence shows that it was a set fire, but I can't see how, even on instructions to the jury, how this court can submit the question to the jury and consequently, I am going to instruct the jury and withdraw the question of liability from the jury, and instruct them that they should only find the damages. The motion is granted.”

IV. It Was Not Error to Deny Appellant the Right Further to Impeach Its Own Witness, Betty Oldham.

At the trial Appellants called Betty Oldham as a witness.

She testified in part as follows (R.T. 42, 43, 44).

Q. Mrs. Oldham, did you see a car parked in the area around the Jones Home?

Mr. Smith: We object, it is leading.

The Court: She may answer "yes" or "no".

The Witness: When I were walking up the sidewalk—

The Court: Answer "yes" or "no" if you saw a car parked.

The Witness: No Sir.

By Mr. Merrill:

Q. Did you see a car parked around your home, or the Jones home that night?

A. People that live there.

Q. Did you see a red and white car there.?

A. I might have, I don't remember.

Q. You say that you might have, could you tell us what you did as you left the club and continued toward your home?

A. I just walked up the highway — the sidewalk — and went home.

Q. And you say that you might have seen a red and white Ford there?

Mr. Smith: We object. I don't think she testified that she might have.

The Court: She said she might have. She has answered the question.

By Mr. Merrill:

Q. Did you go over to the car there?

A. No, sir, I didn't go over to a car.

Q. Was there one there?

A. There was cars setting around there all of the time. They are living there.

Q. Didn't you go over and strike a match to see the license plate of a car?

Mr. Smith: Objection, its leading.

The Court: She may answer "yes" or "no".

The Witness: No, sir.

By Mr. Merrill:

Q. You never did that?

A. I strike matches, there is bushes when its dark.

Q. The question is, you never did strike a match to look at the license plate of a car?

A. I have.

Q. This night, or the early morning?

A. I don't remember if it was that night or some other night — I was drinking.

Q. Have you discussed these things with a Mr. Kennedy that I have been questioning you about?

A. Some of them. I don't know.

Q. Did you give a written statement concerning this?

A. He wrote down something.

Her entire testimony when boiled down is that:

(a) She did not remember what occurred on the night of the fire because she had been drinking beer. She had been in the club from sometime in the afternoon until after one o'clock at night. (R.T. 46, 53, 55).

(b) She had signed a statement later but she hadn't read it. (R.T. 45).

(c) She was sick when she signed the statement. (R.T. 47).

(d) She told the Sheriff and the Chief of Police before the trial that she could not remember what happened on the night of the fire because she had been drinking. (R.T.55).

(e) She could not, and would not, affirm the truth of the matters in the written statement because she had been drinking when she came home on the night of the fire.

The witness was questioned at great length on the statement, but the statement was not admitted in evidence. This ruling was correct under either the State Rule or the Federal Rule.

The Idaho Rule is laid down in *Bodenhamer v. Pacific F. & P. Co.*, 50 Idaho 248, 295 Pac. 243 as follows:

"C.S., 8036 reads:

"The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made, at other times, statements inconsistent with his present testimony.

"The rule is well settled that impeaching evidence of prior contradictory statements does not tend

to establish the truth of the matter contained therein. It can be considered only as tending to affect the credibility of the witness sought to be impeached thereby.

“The theory under which the impeaching evidence is admitted is that appellant was surprised at the unfavorable testimony given by the witness called by him, or the witness is hostile, or the party in calling him has been entrapped to his prejudice. But this rule does not extend to a mere failure to testify to all the facts he was expected to testify to. This is true in jurisdictions having statutes similar to ours. (6 Jones on Evidence, 2d ed., p. 4812) See *Agalianos v. American Cent. Ins. Co.*, 62 Cal. App. 349, 217 Pac. 107, 113 holding that the testimony must be damaging and prejudicial. It must be damaging, not merely negative. (*People v. Floyd*, 78 Cal. App. 11, 247 Pac. 917).

“In the instant case, the witness Brown did not testify unfavorably to appellant; he simply failed to testify as strongly for it as it was anticipated he would testify. Neither does it appear that appellant was entrapped into calling him, nor that the witness was in fact hostile. In any event, the only possible effect of the rejected evidence was to impeach the witness Brown. If we consider all of Brown’s testimony as neutralized, there is still no sufficient evidence in the record to sustain appellants contention that Bodenhamer consented to the sale to appellant, or waived the lien of his mortgage as against appellant’s cash advances. It does not appear from the record that appellant’s defense failed by reason of the exclusion of this evidence, or that the evidence admitted,

together with that rejected, established such defense. The error, if it was error, is therefore not prejudicial and the case should not be reversed on that account."

The statute quoted above is the same statute as the present Section 9-1207, Idaho Code, cited by Appellant. The Idaho Court reaffirmed the interpretation of this statute in a 1960 case, *Wurm v. Pulice*, 82 Idaho 359, 353 P. 2d 1071.

Under the above rule, further impeachment was inadmissible because the testimony of Betty Oldham was entirely negative and did not damage Appellant's case in the least. This witness merely failed to add anything to Appellant's case.

Naturally, since impeachment evidence cannot be admitted to prove the truth of the matters contained therein, the statement could not in any manner have strengthened Appellant's case had it been admitted. No prejudice could possibly have resulted to Appellant by its exclusion.

Under the Federal Rule the trial court is given discretion to permit impeachment of one's own witness upon a showing of real surprise. An exception to the rule requiring a showing of real surprise is in criminal cases wherein the government is under an obligation to call the witness. This exception does not apply in the case at bar because this is a civil case. Of course, prior statements of an impeached witness are not admissible as substantive evidence in any case. The Federal Rule is clearly set forth in *Stevens v. United States* (9th Cir. 1958) 256 F. 2d 619. Of course there was no real showing of surprise in the trial court. (R.T. 147), and the Trial Judge properly exercised his

discretion in denying the further impeachment of Betty Oldham.

V. The Statement of Betty Oldham, Exhibit No. 10, was not admissible as a Record of Past Recollection.

Appellant in its brief is also urging that the statement of Betty Oldham should have been admitted to prove the truth of the matters stated therein. This is a surprising position for Appellant to be taking in view of the testimony of Betty Oldham concerning the written statement. This witness was not stating that she knew the statement was true when she made it. She clearly and certainly testified that the events of the night of the fire were not in her memory because she had been drinking that day.

Appellant is now trying to put a changed meaning into her testimony. It is urging that the witness testified that she knew the things in the statement were true when she signed it, but now she cannot remember. She testified that she was ill when she signed it; that she did not read it; and that she could not remember the events of the night of the fire because she was **then** drinking. She, of course, repudiated the statement before the Sheriff and the Chief of Police. The Sheriff testified concerning the repudiation and largely corroborated Betty Oldham's testimony as to why the statement was incorrect. Her recollection of what occurred, and what she had observed on the night of the fire was not accurate. (R.T.102,103,104).

It is plain, then, that this statement did not qualify as a Record of Past Recollection, and as an exception to the hearsay rule, because the impairment of the faculty of memory of the witness occurred during

the time she was supposed to have been making her original observations, not at the time of trial. This difference makes all of Appellant's citations as to admissibility of a Record of Past Recollection beside the point. Of course, the Court permitted the witness to refresh her memory by reading the statement to herself while she was on the stand (R.T. 44, 45), but her memory was not refreshed and she continued to deny the truth of the things in the statement because, "I don't remember — I had been Drinking — I Don't remember." (R.T. 46).

CONCLUSION

It is respectfully submitted that Exhibit 10 was inadmissible for any purpose; and certainly under any view of the law no prejudice resulted to Appellant by its exclusion since it could not be used to prove the truth of anything stated therein. All of the evidence adduced at the trial did not warrant submission of the issue of liability to the jury, and any verdict against Appellees based thereon could not stand. It follows that the trial court properly took the issue of liability from the jury, and that the judgment should be affirmed.

Respectfully submitted,

A. L. SMITH
of ALBAUGH, BLOEM, SMITH
& PIKE

Attorneys for Appellees

CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the 9th Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

A. L. SMITH

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES HENRY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

MANUEL L. REAL,
United States Attorney,
JOHN K. VAN DE KAMP,
Assistant United States Attorney,
Chief, Criminal Division,
J. BRIN SCHULMAN,
Assistant United States Attorney,
Assistant Chief, Criminal Division,
ANTHONY MICHAEL GLASSMAN,
Assistant United States Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

FILED

MAR 2 1966

WM. B. LUCK, CLERK

Attorneys for Appellee,
United States of America.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES HENRY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

MANUEL L. REAL,
United States Attorney,
JOHN K. VAN DE KAMP,
Assistant United States Attorney,
Chief, Criminal Division,
J. BRIN SCHULMAN,
Assistant United States Attorney,
Assistant Chief, Criminal Division,
ANTHONY MICHAEL GLASSMAN,
Assistant United States Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
I JURISDICTIONAL STATEMENT	1
II STATUTE INVOLVED	2
III STATEMENT OF THE CASE	4
IV STATEMENT OF FACTS	4
V SUMMARY OF ARGUMENT	8
VI ARGUMENT	9
A. THE EVIDENCE TAKEN AS A WHOLE SUPPORTS THE VERDICT OF THE JURY.	9
1. The Government Proved Beyond a Reasonable Doubt That Appellant Henry Received Possession of the Pressure Regulators Knowing the Same to Have Been Stolen.	9
2. The Statements Made By Co-Defendant Fuller Were Properly Admitted.	13
B. THE TRIAL COURT DID NOT COMMIT ERROR IN PERMITTING EVIDENCE OF OTHER ALLEGED OFFENSES.	14
C. THE TRIAL JUDGE DID NOT COERCE THE VERDICT.	16
D. APPELLANT'S MOTION FOR A NEW TRIAL WAS PROPERLY DENIED.	17
E. THERE WAS NO ERROR OR PREJUDICE TO APPELLANT AS A RESULT OF GOVERNMENT COUNSEL'S ARGUMENT CONCERNING THE STATEMENT MADE BY CO-DEFENDANT FULLER TO F. B. I. AGENT LOUGHNEY.	20
VII CONCLUSION	21
CERTIFICATE	22

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Allen v. United States, 164 U.S. 492 (1896)	17
Ballenbach v. United States, 326 U.S. 607 (1946)	12
Degnan v. United States, 271 Fed. 291 (2nd Cir. 1941)	14
Gulley v. United States, 319 F.2d 77 (6th Cir. 1963), cert. denied 375 U.S. 942	9
Kawakita v. United States, 190 F.2d 506 (9th Cir. 1951), aff'd 343 U.S. 717, reh. denied 344 U.S. 850	17
McNamara v. Henkel, 226 U.S. 520 (1913)	12
Melson v. United States, 207 F.2d 558 (4th Cir. 1953)	10
Morrandy v. United States, 170 F.2d 5 (9th Cir. 1948)	12
Orebo v. United States, 293 F.2d 749 (9th Cir. 1961)	20
Perez v. United States, 297 F.2d 648 (9th Cir. 1961)	18
Prila v. United States, 279 F.2d 407 (9th Cir. 1960)	19
Proffit v. United States, 316 F.2d 205 (9th Cir. 1963)	9
Sachs v. United States, 281 F.2d 189 (9th Cir. 1960), cert. denied 364 U.S. 909, 81 S.Ct. 272	14
United States v. Allegrucci, 258 F.2d 70 (3rd Cir. 1958)	9, 12
United States v. Marpes, 198 F.2d 186 (3rd Cir. 1952)	9

	<u>Page</u>
United States v. Spatuzza, 331 F.2d 214 (7th Cir. 1964)	9
United States v. Williams, 194 F.2d 72 (7th Cir. 1952)	14

Statutes

Title 18, United States Code §659	1, 2
Title 18, United States Code §3231	2
Title 28, United States Code §1291	2
Title 28, United States Code §1294	2

Rules

Federal Rules of Criminal Procedure:

Rule 33	17, 18
---------	--------

United States Court of Appeals For the Ninth Circuit:

Rule 18, subd. 2(d)	4
---------------------	---

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES HENRY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

The appellant, James Henry, was indicted with one Aaron Jacob Fuller on September 9, 1964. The indictment was brought under 18 U.S.C., Section 659, and charged that the defendants had bought, received, and had in their possession twenty-two cartons of pressure regulators stolen from an interstate shipment. On October 12, 1964, both defendants pleaded not guilty. The case proceeded to jury trial before the Honorable Peirson M. Hall on November 3, 1964, and was concluded on November 6, 1964. The jury returned verdicts of guilty as to both defendants at 6:10 P.M., on November 6, 1964 [C. T. 7] ^{1/}, and found the value of the stolen

1/ "C. T." refers to Clerk's Transcript of Record

pressure regulators to be in excess of \$100, 000.

On November 23, 1964, co-defendant Fuller was given a five year suspended sentence. Appellant Henry made a motion for a new trial [C. T. 24] and filed an affidavit of his co-defendant Aaron Jacob Fuller in support thereof [C. T. 33, 34, 35 and 36]. The motion for new trial was denied on December 7, 1964, and appellant Henry was sentenced to three years imprisonment and fined the sum of \$1,000 [C. T. 37, 38].

Appellant's Notice of Appeal was timely filed on December 7, 1964 [C. T. 40].

The jurisdiction of the District Court was based upon Title 18, United States Code, Sections 659 and 3231. This Court has jurisdiction to review the judgment of the District Court pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATUTE INVOLVED

The Indictment was brought under Title 18, United States Code, Section 659, which provides in pertinent part as follows:

"Interstate or foreign baggage, express or freight; . . .

"Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motor truck, or other vehicle, or from any station, station house, platform, or depot, . . . with intent to convert to his

own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or

"Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; . . .

* * * * *

"Shall in each case be fined not more than \$5,000 or imprisoned not more than ten years, or both; but if the amount or value of such . . . goods or chattels does not exceed \$100.00, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both. . . .

"To establish the interstate or foreign commerce character of any shipment in any prosecution under this section, the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made."

III

STATEMENT OF THE CASE

Appellee does not restate here the five titles of argument utilized by appellant at pages 13-25 of appellant's brief. ^{2/} Appellee's brief does, however, deal with each point therein stated, citing under the several argument headings whatever testimonial or procedural references are deemed necessary by appellee for the determination of each such issue.

The procedural aspects of the case are otherwise set out herein in appellee's Jurisdictional Statement, supra.

IV

STATEMENT OF FACTS

On August 3, 1964, a truck belonging to the Transport Cartage and Distributing Company of Los Angeles was stolen from its parking lot [R. T. 23]. ^{3/} The truck was loaded with various items of freight being transported in interstate commerce [R. T. 32, 33]. Included among the freight were twenty-two cartons of pressure regulators which had been consigned by Fisher Governor Company, Marshaltown, Iowa, to Meeder Equipment Company, Alhambra, California.

^{2/} We note in this regard that appellant's brief fails to contain a specification of errors or to "set out separately and particularly each error intended to be urged" as is required by Rule 18, subd. 2(d) of The Rules of this Court.

^{3/} "R. T. " refers to Reporter's Transcript of Proceedings.

The truck was subsequently located and was returned to the Transport Cartage Freight house by the onwers' employees on August 4, 1964. However, at this time it was only two-thirds loaded [R. T. 26]. Among the missing items were the twenty-two cartons of pressure regulators [R. T. 35]. Also missing were Thirteen cartons of auto parts and other items of freight [R. T. 36].

Some time during the first week of August, 1964, in Los Angeles, California, the missing twenty-two cartons of pressure regulators and the rest of the stolen freight were purchased by one John Persley from two unidentified men [R. T. 41]. Persley paid a total of \$300 for all of the merchandise he purchased [R. T. 41]. After purchasing the stolen items Persley stored them in his garage [R. T. 41]. At the time of the purchase Persley knew that the pressure regulators were stolen [R. T. 68]. (Persley subsequently pleaded guilty to receiving the stolen pressure regulators which were the subjects of the indictment against appellant Henry and his co-defendant Fuller [R. T. 71]).

After storing the stolen merchandise in his garage Persley talked to appellant Henry about buying the stolen pressure regulators. This initial conversation took place at appellant Henry's used car lot in San Pedro [R. T. 43]. Henry then came to Persley's home and looked at the stolen merchandise stored in the garage [R. T. 43]. Henry took a couple of the pressure regulators as samples to see if he could dispose of them and told Persley "I'll check them and see you later" [R. T. 43, 44].

The next day, Friday, Henry told Persley that something

could be done with the pressure regulators [R. T. 44]. In fact, appellant Henry had arranged to resell the pressure regulators to Industrial Products Co. [R. T. 299].^{4/} Appellant Henry then made arrangements to pick up the stolen pressure regulators the following Monday [R. T. 45]. The agreed purchase price of the regulators between Persley and Henry was to be \$110 [R. T. 50].

The following Monday, at appellant Henry's car lot, appellant told Persley that he (Henry) could "move" the pressure regulators. Persley and co-defendant Fuller then went to Persley's garage, in appellant Henry's station wagon, where they loaded the stolen pressure regulators into the station wagon and transferred them from Persley's garage to appellant Henry's used car lot [R. T. 45, 47].

At the time the stolen regulators were taken to appellant Henry's used car lot they were still in their original containers [R. T. 49]. Persley testified that when Henry saw the regulators in their original containers he stated that they couldn't be moved in those containers [R. T. 49]. Appellant Henry requested Persley to get some new cartons for the regulators at the ABC Market in San Pedro. Persley did so [R. T. 50]. When these regulators were subsequently sold by appellant Henry to the Industrial Products Co., they were not in the original shipping cartons but were packed in food cartons [R. T. 148].

Persley testified that at no time did he tell appellant Henry

^{4/} Sometimes also referred to in the transcript as Industrial Production Supply or Industrial Supply.

that he had found the regulators at a dump [R. T. 62]. On cross-examination Persley stated that he told Henry that "Two fellows brought me a truck. They came in a truck. I have a truckload of stuff and I want to get rid of it." [R. T. 88]. Persley never received a bill of sale from the two men from whom he received the regulators and he never gave a bill of sale to appellant Henry after completing the sale to him for \$110 [R. T. 94].

Quite naturally Persley never specifically articulated to appellant Henry that the pressure regulators were stolen [R. T. 68]. As Persley testified on re-direct examination:

"Q. They didn't tell you it was stolen, did they?

"A. No. This was not something that you discuss if a fellow came to you with a truck. He just brings it, it's just something you've got."
[R. T. 94].

Before completing the purchase of the pressure regulators from Persley appellant Henry had arranged for the sale of these 250 pressure regulators to Industrial Products Company of Alhambra [R. T. 118]. The sale price was \$184. Appellant Henry arranged to have the regulators delivered to William Jones of the Industrial Products Company [R. T. 116]. Jones attempted to deliver, upon a resale, the 250 regulators to the Meeder Company [R. T. 116]. The Meeder Equipment Company, however, had been looking out for the stolen merchandise and had merely played along with the proposed sale. As soon as they had been approached regarding the

sale of the 250 regulators they had notified the F. B. I. [R. T. 145].

The 250 pressure regulators delivered to the Meeder Equipment Company were the same regulators that the Meeder Company had ordered from the Fisher Governor Company August of 1964 [R. T. 132], and which had been stolen from the parking lot of Transport Cartage and Delivery Company.

V

SUMMARY OF ARGUMENT

- A. The Evidence Taken as a Whole Supports the Verdict of the Jury.
 - 1. The Government Proved Beyond a Reasonable Doubt That Appellant Henry Received Possession of the Pressure Regulators Knowing the Same to Have Been Stolen.
 - 2. The Statements Made by Co-Defendant Fuller to Agent Loughney Were Properly Admitted.
- B. The Trial Court Did Not Commit Error in Permitting Evidence of Other Alleged Offenses.
- C. The Trial Judge Did Not Coerce the Verdict.
- D. Appellant's Motion for a New Trial was Properly Denied.
- E. There Was No Error or Prejudice to Appellant as a Result of Government Counsel's Argument Concerning the Statement Made by Co-Defendant Fuller to F. B. I. Agent Loughney.

ARGUMENT

A. THE EVIDENCE TAKEN AS A WHOLE
SUPPORTS THE VERDICT OF THE
JURY.

1. The Government Proved Beyond a Reasonable Doubt That Appellant Henry Received Possession of the Pressure Regulators Knowing the Same to Have Been Stolen.
-

That a defendant may be convicted upon only the uncorroborated testimony of an accomplice cannot be questioned.

Proffit v. United States, 316 F. 2d 205 (9th Cir. 1963);

Gulley v. United States, 319 F. 2d 77, 80 (6th Cir.

1963), cert. denied 375 U. S. 942;

United States v. Marpes, 198 F. 2d 186 (3d Cir. 1952).

The credibility of the accomplice is, of course, a question for the jury.

United States v. Marpes, supra.

Thus the testimony of the accomplice, Persley, could have been sufficient, in and of itself to have convicted appellant Henry if believed by the jury beyond a reasonable doubt.

Knowledge of the stolen character of the pressure regulators involved may be established by circumstantial evidence.

United States v. Spatuzza, 331 F. 2d 214 (7th Cir. 1964);

United States v. Allegrucci, 258 F. 2d 70 (3d Cir. 1958).

There was considerable evidence adduced from which the

jury could conclude that appellant Henry must have had knowledge that the pressure regulators he purchased from Persley were stolen. We note by way of example the following:

(a) That Persley knew that the pressure regulators were stolen and never tried to conceal that fact from the appellant [R. T. 68].

(b) That appellant Henry told Persley that they couldn't be moved in their original containers [R. T. 49], and told Persley to get new ones.

(c) That appellant Henry had arranged to resell the regulators prior to his receipt of the regulators from Persley [R. T. 299].

(d) That appellant Henry received no bill of sale for the regulators [R. T. 210], nor for that matter did Persley who admitted that he knew from the circumstances that they were stolen.

(e) That the regulators had a value of at least \$600 [R. T. 138] and were purchased by appellant for considerably less and resold by appellant for an amount still far less than their market value, once the markings of ownership had been removed.

(f) That co-defendant Fuller and Persley went to Persley's garage to pick up the stolen pressure regulators in Henry's station wagon.

(g) That appellant Henry stated that he could move the goods.

In Melson v. United States, 207 F. 2d 558, 559 (4th Cir. 1953), the defendant was indicted for having in his possession 400 cases of

eggs. The defendant admitted helping sell the eggs but denied knowing that they were stolen. The Fourth Circuit held that:

"It is obvious that these circumstances, particularly the low price at which the eggs were sold by the defendant and his associate, and the obliteration of marks of ownership from the cartons, were such as to justify the inference that the defendant had knowledge that the goods had been stolen. "

Appellant Henry never denied that the pressure regulators were placed in different cartons at his direction. While Persley could not recall the exact markings on the original containers he could recall that there were addresses on them and that the addresses were somewhere in Alhambra, California [R. T. 49]. The original consignee of the pressure regulators, Meeder Equipment Company is located at 2007-11 West Mission Road, Alhambra, California. It seems clear that there could have been only one reason for appellant Henry to direct Persley to place the regulators in new cartons; that reason being that he wanted to remove the name of the legal consignee of the merchandise.

At the time that Henry inspected the pressure regulators the name of the original consignee was marked on the carton [R. T. 49]. If appellant Henry had really not known that the regulators were stolen wouldn't he have at least inquired into the identity of the consignee? And if he never noticed that the cartons had the name of the original consignee affixed to them why then did he tell Persley that the goods couldn't be moved in the cartons

they were in? Appellant, although having testified on his own behalf, offered no explanation to cover the obvious reason for changing the cartons.

The evidence that appellant Henry received no bill of sale from Persley is indicative of Henry's guilty knowledge. Appellant Henry had already arranged to resell the regulators to Industrial Products prior to the time that he accepted the regulators from Persley. He knew they were not junk and he knew what value they had. The fact that no bill of sale was received was in keeping with the entire transaction. Nothing had to be articulated regarding the stolen character of the regulators. In transactions of this nature nothing overt need be said; everything is understood [R. T. 94].

Finally, it is accepted law that if an individual is found to be in possession of recently stolen property, this is a circumstance from which a jury may infer that the person in possession knew that the property had been stolen.

Ballenbach v. United States, 326 U.S. 607, 616
(1946);

McNamara v. Henkel, 226 U.S. 520, 524-525 (1913);
United States v. Allegrucci, 258 F. 2d 70 (3d Cir.
1958);

Morrandy v. United States, 170 F. 2d 5, 6 (9th Cir.
1948).

2. The Statements Made By Co-Defendant
Fuller Were Properly Admitted.

Appellant states in his brief at page 19, that "nor were the statements of Fuller, an accomplice, received with caution or weighed with great care by the jury". This is mere conjecture by appellant. He cannot possibly know how the jury received or weighed the statements made by Fuller, and it must be presumed that the jury followed the specific instructions of the Court.

When Agent Loughney testified as to the conversation he had with co-defendant Fuller, counsel for appellant Henry objected to any of these statements being admitted against Henry [R. T. 156]. The Court at that time instructed the jury:

"Any testimony concerning any statements made by the defendant Fuller out of the presence of the defendant Henry may be considered by you only in connection with the defendant Fuller."

[R. T. 156].

Thus the statements made by Fuller were admitted only for the limited purpose of being considered against Fuller and not as against appellant Henry.

Later on during Agent Loughney's testimony, he testified as to another conversation he had had with Fuller. At this time there was no objection by counsel for appellant Henry [R. T. 163]. It seems clear that counsel understood that the jury had already been properly advised, just a few minutes earlier, that any

statements made by Fuller were only to be admitted in connection with the defendant Fuller.

B. THE TRIAL COURT DID NOT COMMIT
ERROR IN PERMITTING EVIDENCE OF
OTHER ALLEGED OFFENSES.

The trial court did not err in permitting into evidence testimony that the interstate shipment in question contained shifters, carpeting, chemicals and some skylights in addition to the subject regulators [R. T. 40]. The evidence was introduced only for the limited purposes of showing what was in the stolen shipment and to show intent and guilty knowledge. In Degnan v. United States, 271 Fed. 291 (2d Cir. 1941), it was held that evidence that the defendant had been handling other items, also proved to have been stolen from the same shipment at the same place and time, was admissible to show the intent and guilty knowledge of the defendant.

The Government only introduced evidence that appellant Henry knew what other stolen merchandise Persley had in his garage for the purpose of showing appellant Henry's intent and to show the extent of Henry's knowledge of the nature of Persley's business.

See Sachs v. United States, 281 F. 2d 189, 191
(9th Cir. 1960), cert. denied 81 S. Ct. 272,
364 U. S. 909.

In United States v. Williams, 194 F. 2d 72, 77 (7th Cir. 1952), the District Court permitted evidence as to what other items had

had been stolen from an interstate shipment. None of these items were the subject of the indictment against the defendant. The Seventh Circuit held that:

"Showing the theft of the other crates, cartons, and the pick-up truck would tend to show that the ice cube maker had also been stolen and when it had been stolen. The evidence was proper for this purpose."

The fact that appellant Henry viewed this other stolen merchandise in Persley's garage is probative evidence going to his criminal intent and guilty knowledge. It should have been obvious to appellant Henry that Persley, an unemployed truck driver, would not have had so much varied merchandise in his garage in original cartons unless such had been obtained in an unlawful manner.

The evidence regarding co-defendant Fuller's other similar criminal activities was admitted only for the purpose of showing co-defendant Fuller's criminal intent. The jury was instructed that the evidence was only to be considered in connection with the defendant Fuller and not against appellant Henry [R. T. 156]. These criminal activities by Fuller (receipt and possession of goods stolen from an interstate shipment) were not part of Fuller's "past life" of crime but were contemporaneous with and identical to the charge in the indictment and as such were admissible against the defendant Fuller.

C. THE TRIAL JUDGE DID NOT COERCE
THE VERDICT.

The jury retired to begin their deliberations on Friday afternoon at 2:10 p. m. At 5:00 p. m. , the jury was called back into the courtroom and the foreman informed the judge that they had not yet been able to arrive at a verdict [R. T. 292]. At this point the trial judge stated to the jury:

" . . . The case has taken the better part of three days to try, it has cost the Government and the defendants some considerable money, if you can arrive at a verdict you should do so. . . "

The judge further told the jurors that he did not suspect that any new jury would be any more intelligent than they were and that they should try and arrive at a verdict in the next 30 minutes.

At 5:40 p. m. , the jury returned and inquired whether or not appellant Henry had made arrangements with Industrial Products prior to buying the goods from Persley [R. T. 297]. It was stipulated by all parties that appellant Henry had contacted Industrial Products before he purchased the goods from Persley. Upon questioning by the court the foreman then advised the court that he thought the jury would be able to arrive at a verdict. The jury then retired from the courtroom at 5:55 p. m. At 6:10 p. m. , the jury returned verdicts of guilty against appellant and his co-defendant Fuller.

This type of supplemental instruction has been approved by

the United States Supreme Court in Allen v. United States, 164 U. S. 492, 501-502 (1896). The Ninth Circuit has also approved a similar charge by the trial judge. Kawakita v. United States, 190 F. 2d 506 (9th Cir. 1951), aff'd 343 U. S. 717, reh. denied 344 U. S. 850.

This Court, in the Kawakita case, stated that "It is far more likely that the earnest and thorough talk to the jury by the judge impressed the members with their duties to eliminate personal conflict of temperament and weigh the evidence in the cold scale of impersonal logic." This would appear to be precisely the effect that the trial judge's charge had on the jury. Within thirty-five minutes after receiving the charge they had returned to the courtroom with apparently only one question left unresolved. Upon the resolution of that question they almost immediately arrived at their verdict. There was no coercion involved. Only an appeal to logic and reason, with no direction by the court to other than earnestly deliberate the facts of the case.

D. APPELLANT'S MOTION FOR A NEW TRIAL WAS PROPERLY DENIED.

The grounds for a motion for a new trial are set forth in Rule 33, Federal Rules of Criminal Procedure. One of these grounds include newly discovered evidence. It is clear that from the date of filing of appellant Henry's motion for new trial, November 18, 1964, and as enlarged upon in his second such motion filed on December 2, 1964, that as more than 5 days had passed from

the date of jury verdict, November 6, 1964, the motions could only be treated as based upon alleged "newly discovered evidence" [R. T. 312]. Rule 33, supra. The grounds alleged by appellant, in attack upon the jury's verdict were not, however, proper grounds for such a motion for new trial under Rule 33.

Co-defendant Fuller's affidavit, attached to appellant Henry's motion for a new trial did not contain reference to facts which were unknown to Henry at the time of trial and did not constitute newly discovered evidence within the meaning of Rule 33, Federal Rules of Criminal Procedure.

Defendant Fuller, himself a convicted felon, after having been granted probation by the District Court, then presented a detailed story of the alleged background of his possession of the pressure regulators. He attempted to join appellant Henry's other alibi witnesses in disputing accomplice Persley's trial testimony. He added nothing new as to Henry's role in receiving and re-selling the regulators which was not presented by other witnesses to the jury. He merely tried to impeach Persley by his declaration. It should be noted that Fuller's declaration is contrary to what he had told Agent Loughney of the F. B. I. He spoke falsely then, or in the affidavit, or both.

The Ninth Circuit in reviewing a similar situation, where a friend's affidavit contained alleged "newly discovered evidence" said in Perez v. United States, 297 F. 2d 648 (9th Cir. 1961):

"The proposed new evidence was an attempt to impeach the identifying witness, Lira. It all 'existed'

prior to the trial. There was nothing of due diligence in seeking it. Prila v. United States, 279 F. 2d 407, 408 (9th Cir. 1960); Pitts v. United States, 263 F. 2d 808 (9th Cir. 1959), cert. denied 360 U.S. 919, . . . "

In Prila v. United States, supra, the Ninth Circuit held:

"A motion for a new trial based on the ground of newly discovered evidence has to meet the following requirements: (1) It must appear from the motion that the evidence relied on is, in fact, newly discovered after the trial; (2) the motion must allege facts from which the court may infer diligence on the part of the movant; (3) the evidence relied on must not be merely cumulative or impeaching; (4) must be material to the issues involved; and (5) must be such as, on a new trial, would probably produce an acquittal. "

The motion for new trial was properly denied.

E. THERE WAS NO ERROR OR PREJUDICE
 TO APPELLANT AS A RESULT OF
 GOVERNMENT COUNSEL'S ARGUMENT
 CONCERNING THE STATEMENT MADE
 BY CO-DEFENDANT FULLER TO F. B. I.
 AGENT LOUGHNEY.

Government counsel's reference to the statement made by co-defendant Fuller to Agent Loughney was only through inadvertence and was not calculated to prejudice the appellant Henry. The conversation in question had already been restricted as evidence solely against co-defendant Fuller [R. T. 156].

When counsel for appellant objected to Government counsel's argument the court instructed the jury again in reference to that conversation that "It was not admitted against Mr. Henry, it was admitted against Mr. Fuller only" [R. T. 263]. Following this Government counsel stated "I will retract that phase of the argument, Your Honor." [R. T. 263]. Certainly an inadvertent comment such as this, when followed by a proper admonishment by the trial judge could not have been so prejudicial as to have been the cause of appellant's conviction.

Orebo v. United States,

293 F. 2d 749 (9th Cir. 1961).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction of appellant Henry should be affirmed.

Respectfully submitted,

MANUEL L. REAL,
United States Attorney,

JOHN K. VAN DE KAMP,
Assistant United States Attorney,
Chief, Criminal Division,

J. BRIN SCHULMAN,
Assistant United States Attorney,
Assistant Chief, Criminal Division,

ANTHONY MICHAEL GLASSMAN,
Assistant United States Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Anthony Michael Glassman

ANTHONY MICHAEL GLASSMAN

NO. 20318

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUIS HERNANDEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

MANUEL L. REAL,
United States Attorney,
JOHN K. VAN DE KAMP,
Assistant U. S. Attorney,
Chief, Criminal Division,
J. BRIN SCHULMAN,
Assistant U. S. Attorney,
Assistant Chief, Criminal Division,

600 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

FILED

SEP 28 1965

FRANK H. SCHMID, CLERK

Attorneys for Appellee,
United States of America.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUIS HERNANDEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

MANUEL L. REAL,
United States Attorney,
JOHN K. VAN DE KAMP,
Assistant U. S. Attorney,
Chief, Criminal Division,
J. BRIN SCHULMAN,
Assistant U. S. Attorney,
Assistant Chief, Criminal Division,

600 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
I. JURISDICTIONAL STATEMENT	1
II. STATUTES INVOLVED	2
III. STATEMENT OF THE CASE	3
A. DISTRICT COURT PROCEEDINGS	3
B. STATEMENT OF FACTS	6
IV. ARGUMENT	21
A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR BILL OF PARTICULARS.	21
B. THE EVIDENCE PRESENTED AT TRIAL IS SUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION.	26
C. APPELLANT'S ARREST WAS PROPER AND BASED UPON PROBABLE CAUSE.	28
D. IT IS IMMATERIAL TO THIS CASE THAT AT THE TIME OF APPELLANT'S ARREST HE WAS NOT FULLY ADVISED OF HIS RIGHTS.	31
E. APPELLANT WAS NOT DENIED THE RIGHT TO SUBPOENA WITNESSES.	31
F. THE COURT COMMITTED NO PREJUDICIAL MISCONDUCT IN RENDERING ITS JUDGMENT.	33
V. CONCLUSION	34
CERTIFICATE	35

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Brinegar v. United States, 338 U. S. 160 (1949)	29
Byrnes v. United States, 327 F.2d 825 (9th Cir. 1964), cert. den. 377 U. S. 970	27
Carroll v. United States, 267 U. S. 132 (1925)	30
Costello v. United States, 298 F.2d 99 (9th Cir. 1962)	26
Draper v. United States, 358 U. S. 307 (1959)	26, 30
Dumbra v. United States, 268 U. S. 435 (1925)	30
Frederick v. United States, 163 F.2d 536 (9th Cir. 1947), cert. den. 332 U. S. 775	23
Glasser v. United States, 315 U. S. 60 (1942)	27, 28
Go-Bart v. United States, 282 U. S. 344 (1931)	30
Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949), cert. den. 338 U. S. 860	22
Husty v. United States, 282 U. S. 694 (1931)	30
Ingram v. United States, 360 U. S. 672 (1959)	27
Kaufman v. United States, 163 F.2d 404 (6th Cir. 1947), cert. den. 333 U. S. 857	25
Kobey v. United States, 208 F.2d 583 (9th Cir. 1953)	22
Kotteakos v. United States, 328 U. S. 750 (1946)	28

	<u>Page</u>
Miller v. United States, 357 U. S. 301 (1958)	30
Norfolk v. McKenzie, 116 F. 2d 632 (6th Cir. 1941)	27
Noto v. United States, 367 U. S. 290 (1961)	27
Nye & Nissen v. United States, 168 F. 2d 846 (9th Cir. 1948), aff'd. 336 U. S. 613	23
People v. Breen, 130 Cal. 72 (1900)	25
People v. Maddox, 46 Cal. 2d 301 (1956), cert. den. 352 U. S. 85	29
Remmer v. United States, 205 F. 2d 277 (9th Cir. 1953), remanded on other grounds, 347 U. S. 227	22, 23, 24
Robinson v. United States, 33 F. 2d 238 (9th Cir. 1929)	23
Rogers v. United States, 340 U. S. 367 (1960)	33
Rubio v. United States, 22 F. 2d 766 (9th Cir. 1927)	23
Santiago v. United States, 327 F. 2d 573 (2nd Cir. 1964)	28
Sawyer v. United States, 89 F. 2d 139 (8th Cir. 1937)	25
Schino v. United States, 209 F. 2d 67 (9th Cir. 1954), cert. den. 347 U. S. 937	22
Stein v. United States, 337 F. 2d 825 (9th Cir. 1964)	27
Stoppelli v. United States, 183 F. 2d 391 (9th Cir. 1950), Cert. den. 340 U. S. 864	26

	<u>Page</u>
Todorow v. United States, 173 F.2d 439 (9th Cir. 1949)	23, 24
United States v. Ansani, 240 F.2d 216 (7th Cir. 1957), cert. den. 353 U.S. 936	24
United States v. Callahan, 18 F.R.D. 486 (D.C. W.D. Wash. 1955)	23
United States v. Escobedo, 378 U.S. 478 (1964)	31
United States v. Hudson, 176 F.Supp. 323 (D.C. M.D. Ga. 1959)	23
United States v. Lebron, 222 F.2d 531 (2nd Cir. 1955), cert. den. 350 U.S. 876	25
United States v. Mangiaracina, 92 F.Supp. 96, 10 F.R.D. 415 (W.D. Mo. 1950)	24
United States v. Rabinowitz, 339 U.S. 56 (1950)	30
United States v. Volkell, 251 F.2d 333 (2nd Cir. 1958), cert. den. 356 U.S. 962	28
William v. United States, 273 F.2d 781 (9th Cir. 1959)	28
Wong Tai v. United States, 273 U.S. 77, 47 S.Ct. 300, 71 L.Ed. 545 (1927)	22, 23
Yeargain v. United States, 314 F.2d 881 (9th Cir. 1963)	22, 24

Statutes

California Penal Code:

§830	29
§844	29
§943	25

	<u>Page</u>
Title 18, United States Code, §3231	2
Title 21, United States Code, §174	1, 2
Title 26, United States Code, §7607	28
Title 28, United States Code, §1291	2
Title 28, United States Code, §1294	2

Rules

Federal Rules of Civil Procedure:

Rule 45	31
---------	----

Federal Rules of Criminal Procedure:

Rule 6	25
Rule 7	25
Rule 7 (f)	22

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUIS HERNANDEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

1.

JURISDICTIONAL STATEMENT

Appellant, Luis Hernandez, was indicted by the Federal Grand Jury for the Southern District of California on April 29, 1964, in District Court Case No. 33606-CD. [C. T. 2]. 1/
The indictment charged six counts involving violation of Title 21, United States Code, Section 174, sale and concealment of heroin.

Appellant was arraigned, entered pleas of not guilty [C. T. 18] and on August 18, 1964, after first waiving jury, was found guilty by the court, as charged on all counts [C. T. 22-23].

On August 28, 1964, appellant was sentenced to five years imprisonment on each of Counts One and Two, the sentences to run

1/ "C. T." refers to Clerk's Transcript of Record.

consecutively, and five years on each of Counts Three, Four, Five and Six, the sentences to run concurrently with those imposed on Counts One and Two [C. T. 25].

A timely notice of appeal from the judgment of conviction was filed on August 28, 1964 [C. T. 26]:

The jurisdiction of the District Court rests on Title 18, United States Code, Section 3231 and Title 21, United States Code, Section 174. This Court has jurisdiction to review the judgment of the District Court pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Title 21, United States Code, Section 174, provides in pertinent part as follows:

"Whoever fraudulently or knowingly . . . receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought into the United States contrary to law, or conspires to commit any such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than 20 years, and in addition may be fined not more than \$20,000 . . .

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the

defendant explains the possession to the satisfaction of the jury. "

III

STATEMENT OF THE CASE

A. DISTRICT COURT PROCEEDINGS

Appellant, having been indicted by the Federal Grand Jury on April 29, 1964, [C. T. 2] was arraigned in the District Court on May 25, 1964 and pleaded not guilty to the six count indictment [C. T. 18], which indictment charged, in summary, as follows:

Count One: that on or about March 31, 1964, in Los Angeles County, within The Central Division of The Southern District of California, appellant knowingly and unlawfully received, concealed, and facilitated the concealment and transportation of heroin, which as appellant knew, previously had been imported into the United States of America contrary to law.

Count Two: that appellant knowingly and unlawfully sold and facilitated the sale to an undercover assistant of the Federal Bureau of Narcotics, of heroin, which as appellant knew, had been imported into the United States of America contrary to law.

Counts Three and Four: paralleled the respective charging language of Counts One and Two, dealing however with a different quantity of heroin and referring to activities on or about April 2, 1964.

ORIGINAL ARTICLES

THE TREATMENT OF TUBERCULOSIS

By J. H. HARRIS, M.D., University of California, San Francisco

Read before the American Medical Association, San Francisco, California, April 15, 1919

THE treatment of tuberculosis has been the subject of much discussion and controversy for many years. The various methods of treatment have been numerous and have varied greatly in their results.

Continued

THE treatment of tuberculosis has been the subject of much discussion and controversy for many years.

The various methods of treatment have been numerous and have varied greatly in their results.

The treatment of tuberculosis has been the subject of much discussion and controversy for many years.

The various methods of treatment have been numerous and have varied greatly in their results.

The treatment of tuberculosis has been the subject of much discussion and controversy for many years.

The various methods of treatment have been numerous and have varied greatly in their results.

Continued

THE treatment of tuberculosis has been the subject of much discussion and controversy for many years.

The various methods of treatment have been numerous and have varied greatly in their results.

The treatment of tuberculosis has been the subject of much discussion and controversy for many years.

The various methods of treatment have been numerous and have varied greatly in their results.

The treatment of tuberculosis has been the subject of much discussion and controversy for many years.

The various methods of treatment have been numerous and have varied greatly in their results.

The treatment of tuberculosis has been the subject of much discussion and controversy for many years.

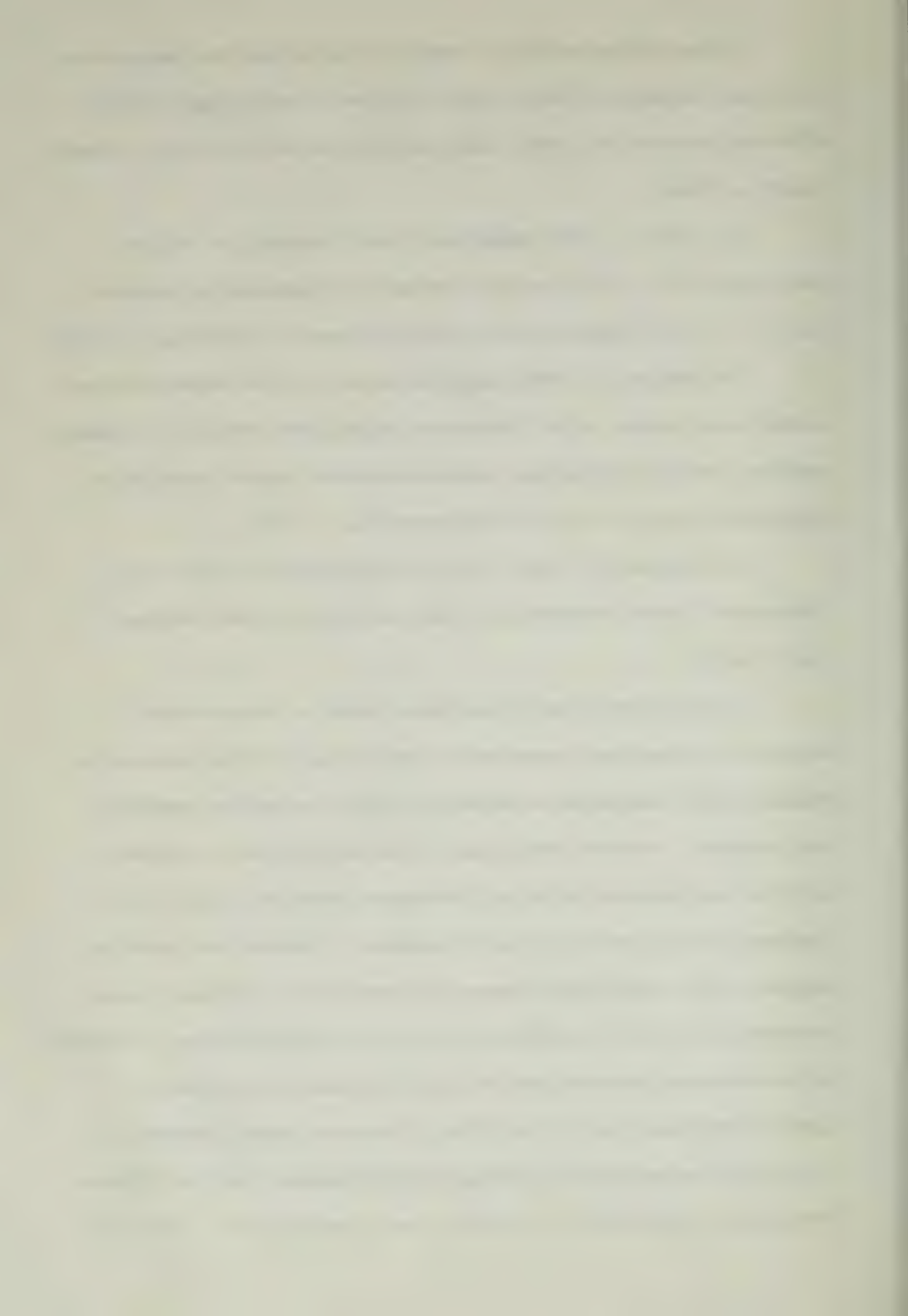
Counts Five and Six: similarly paralleled the respective charging language of Counts One and Two, dealing again with a different quantity of heroin and referring to activities on or about April 3, 1964.

On June 1, 1964, appellant filed a motion for bill of particulars, [C. T. 8], which having been opposed by appellee [C. T. 11], was denied by the court on June 15, 1964 [C. T. 19].

On August 7, 1964, appellee filed its Trial Memorandum in the case, which in its "Summary of the Government's Evidence" section, detailed the dates, times and other details relating to the several charges of the indictment [C. T. 28].

On August 18, 1964, court trial before the Honorable Thurmond Clarke commenced, jury having first been waived [C. T. 22].

At the conclusion of the Government's case in chief, counsel for appellant requested a continuance for the purpose of calling three defense witnesses, one who was said to reside in Los Angeles, another whose exact whereabouts were unknown, but who was believed to be in Chihuahua, Mexico, and a third who was said to reside in San Francisco. Counsel for appellant argued to the court that because the court had previously denied his motion for bill of particulars as to the precise times and dates of the offenses, counsel had no idea who was going to testify against appellant [R. T. 245-246]. The only stated purpose by counsel for appellant for calling such witnesses was that "These witnesses would testify to I think a very material fact, that is a



conversation, a disagreement between the defendant and the informer in this case." [R. T. 246].

As counsel for appellee pointed out to the trial court, the trial memorandum filed by the Government in the court below, eleven days prior to the commencement of trial, indeed spelled out with specificity the exact times, dates, relative to each of the several transactions [R. T. 247, C. T. 28, et seq.].

It was also noted below that at no time had appellant's counsel caused any subpoenas to be issued by the Clerk of the Court, for the mysterious three witnesses, their names being obviously familiar to appellant's counsel, even though no mention was otherwise made during the course of the trial [R. T. 271].

The motion for continuance was denied. [R. T. 247].

Although the court immediately upon the completion of all of the evidence in the case announced its judgment of guilty as to all counts, upon the request of appellant's counsel to be heard in argument, the court vacated its ruling and listened to argument [C. T. 23; R. T. 272-273]. Thereafter appellant was found guilty as charged on all six counts [R. T. 277].

On August 28, 1964, appellant was sentenced to five years on each of Counts One and Two, the sentences to run consecutively, and five years on each of Counts Three, Four, Five and Six to run concurrently with the sentence imposed on Counts One and Two, for a total period of ten years [C. T. 25].

Appellant filed timely notice of appeal on August 28, 1964 [C. T. 26].

B. STATEMENT OF FACTS

At approximately 10:00 A.M., March 31, 1964, according to the testimony of Michael Kanavalov, Kanavalov met appellant Luis Hernandez and appellant's brother at a cafe near Whittier Boulevard and Lorena in Los Angeles, California. In the ensuing conversation Kanavalov told appellant that he had been " . . . purchasing heroin from someone that was no good . . . " and asked appellant if there would be any possibility of his purchasing heroin from appellant [R. T. 38-39, 78]. Following additional conversation appellant replied in the affirmative and told Kanavalov to meet him, with one Munoz, later the same evening [R. T. 39]. 2/

Thereafter Kanavalov had a meeting with Federal Bureau of Narcotics Agents Frost and Garcia at approximately 6:00 - 6:30 P.M., at which time a radio transmitting device was placed on Kanavalov's person and he was searched by the agents and provided with \$120 of Government money [R. T. 39-41].

Kanavalov then proceeded to Whittier Boulevard, looked for appellant in Marty's Bar, inquired as to whether the bartender had seen him, and not finding appellant, Kanavalov walked to the corner of Whittier and Lorena where he stood waiting. After about ten minutes, or at about 7:00 p.m., Kanavalov heard and saw appellant whistle and motion to him. Appellant was at this time waiting at a location just south of Whittier Boulevard. Kanavalov walked over to appellant and told him that he had come to purchase some heroin.

2/ "R. T. " refers to Reporter's Transcript of Proceedings.

After a brief discussion, appellant told Kanavalov "O. K. . . . Go down to 7th and Lorena and wait for me at this little cafe." [R. T. 45].

Kanavalov then walked to the cafe and ordered a cup of coffee. In a few minutes appellant (known by Kanavalov also as "Indio") then called for Kanavalov to come outside. Kanavalov departed the cafe, met with appellant, and together they sat down on the curb in front of the cafe. Appellant asked Kanavalov if he had the money, and Kanavalov replied in the affirmative and handed appellant the \$120 he had earlier been provided by Agents Frost and Garcia [R. T. 47]. This was the only paper money which Kanavalov had at the time. The two men then stood up and appellant told Kanavalov that "That stuff is across the street." Upon walking across the street, appellant kicked an object and said "There it is." Kanavalov picked the object up. It was wrapped in blue-green paper and felt as though it contained some rubbers. The two men separated and Kanavalov thereafter met with Agents Garcia and Frost and handed them the object. This was later determined to contain two rubber contraceptives containing heroin [Exhibit 1 Series; R. T. 20].

Kanavalov further testified that on April 2, 1964, at approximately 3:30 p.m., he again met appellant at Marty's Bar and appellant again agreed to sell heroin to him. They arranged to meet between the hours of 6:00 and 7:00 p.m., the same evening [R. T. 51-52].

Kanavalov again contacted Agents Frost and Garcia who picked him up at approximately 6:00 p.m., and drove with him

to the same general vicinity where he had previously purchased heroin from appellant on March 31. Kanavalov was again searched, provided with a radio transmitter and furnished \$180 by the agents [R. T. 53-54].

Kanavalov then walked to Marty's Bar, looked for appellant and not finding him walked to a point just south of Whittier Boulevard and waited in front of a "TV shop". Appellant then called to Kanavalov from a neighboring parking lot. Kanavalov walked over to appellant and upon appellant inquiring as to how much heroin Kanavalov wanted, Kanavalov responded "three quarters" (defined by Kanavalov as the vernacular for three quarters of an ounce of heroin) [R. T. 56]. Appellant asked if Kanavalov had the money, and when Kanavalov responded that he did, the two men started to walk towards the adjacent alley. Upon appellant's request, Kanavalov gave him the \$180. When they reached a point almost at the end of the alley, appellant reached down and picked up a package which had been residing next to a board on the ground [R. T. 57]. The package was wrapped in greenish-blue paper and contained three rubber balloons (or contraceptives). Kanavalov left appellant with the understanding that they would meet the next day. He then met with Agents Frost and Garcia and gave them the package [Exhibit 2 Series]. The powdery contents of these contraceptives were later determined to contain heroin [R. T. 24].

Kanavalov testified that he met once again with appellant on April 3, 1964, at approximately 7:00 p.m., at Marty's Bar. He again told appellant that he wanted to buy some heroin but that he

didn't have all of his money together yet. Appellant agreed to meet with him in about an hour or an hour and one half at the little coffee shop at 7th and Lorena [R. T. 61-63].

Kanavalov then got in touch with Agents Frost and Garcia and a short time later the agents picked Kanavalov up at his home, searched him, placed a radio transmitter on him and furnished him with \$240 of Government money. The agents then drove Kanavalov to the same vicinity where he had purchased heroin from appellant on the two prior occasions [R. T. 64-65].

Kanavalov walked to the designated meeting place and after waiting about fifteen minutes in the cafe, observed appellant, who was across the street, motioning for him to come over. Kanavalov did so and upon appellant's inquiry as to how much he wanted, Kanavalov replied that he wanted four "quarters" of heroin [R. T. 67-69]. Appellant asked Kanavalov for the money and Kanavalov gave him the \$240. The two men then walked in a southerly direction on the east side of Lorena Street, toward Atlantic Boulevard. They stopped in front of a house, at which time appellant told Kanavalov to continue walking to the corner of Atlantic and to come right back, at which time appellant would then give him "the stuff" [R. T. 69]. Kanavalov did as he was told and as he was returning, appellant came out from alongside the house and handed Kanavalov a bag. The men separated and Kanavalov then met with the agents and gave them the package which was subsequently determined to contain four contraceptives of heroin [Exhibit 3 Series; R. T. 24, 70-72].

On none of the three occasions when Kanavalov met with appellant, did he have any money in his possession other than that which had been furnished by the agents, nor did he have any other narcotics in his possession than that received from appellant. Kanavalov also testified that at no time had he been promised any leniency or reward by any Government official to induce his testimony at trial. [R. T. 73-76].

On cross-examination, Kanavalov testified that he himself had been arrested by federal narcotics agents on a charge of possession of heroin some months previous to the instant transactions with appellant, that he had been released on \$10 bail, and that he had been working for the agents for about nine months as an informant. Kanavalov had never been convicted of a felony. Kanavalov also testified that he received no money from any Government agent other than witness fees and a sum of \$10 or \$20 which he borrowed from an agent, signing a note to return same. [R. T. 79-83, 87-88, 101, 115-116].

On re-direct examination, Kanavalov testified that although on cross-examination he had testified to the general effect that he had been advised by the agents that if he cooperated with the Government, no indictment would be returned against him, actually no such language or promises were ever used or made by the agents; rather that it was his "hope . . . that no indictment would be returned." [R. T. 155-156]. Kanavalov also testified that he had never been told or promised that if he cooperated, no case would be filed against him. "They told me they actually weren't

promising me anything but it would help me." [R. T. 156]. He was not told, however, how it would help him [R. T. 156-157].

In addition to the instant case, Kanavalov had also worked in an undercover capacity with the federal agents in two other cases [R. T. 157].

Federal Bureau of Narcotics Agent Garcia, on cross-examination testified, inter alia, that he searched Kanavalov prior to each meeting with appellant and that "I went through his pockets. I put my hand in his pants pockets. I felt the top of his socks. I looked through the cuff of his pants, if they had cuffs. If he had a jacket, I would check the lining and check it inside of his pockets, and through his billfold" [R. T. 148].

Federal Bureau of Narcotics Agent Lawrence Katz, testified as to his surveillance of the vicinity of Whittier and Lorena Streets on the evening of March 31, 1964 (the first transaction). He testified as to observing the meeting between Kanavalov and appellant near that intersection, at which time the two men were seen to engage in a brief conversation. He subsequently saw Kanavalov walk to the cafe at 7th and Lorena, and then meet outside the cafe with appellant. The two men were observed squatting together in front of the cafe, apparently having a conversation. Katz testified that appellant and Kanavalov then walked across the street where, following another brief conversation, Kanavalov kneeled down near the curb, picked something up, resumed conversation briefly with appellant and then left appellant and walked northerly on Lorena Street [R. T. 165-170].



Federal Bureau of Narcotics Agent Chris V. Saiz also testified as to his surveillance activities as they pertained to appellant's meetings with Kanavalov. As to the March 31, 1964 meeting, Agent Saiz testified that he followed Kanavalov to the cafe on Lorena Street and observed that Kanavalov was inside the cafe; that a few minutes later appellant came up to the cafe and signalled Kanavalov to come out, by making a beckoning motion with his hand; that Kanavalov came out of the cafe and met with appellant and the two men squatted down near the curb in front of the cafe and engaged in a brief conversation during which time Kanavalov handed something to appellant; that appellant and Kanavalov then walked across the street to a place where appellant shoved or pointed at something with his foot, followed by Kanavalov reaching down and appearing to pick something up; and that the two men then separated with Kanavalov walking north on Lorena [R. T. 173-177].

Agent Saiz testified that on April 2, 1964, he again assisted Agents Frost and Garcia with their pending investigation and again established a foot surveillance in the area of Whittier and Lorena. He observed Kanavalov alone for a while in that vicinity after which time he saw appellant motion to Kanavalov to come to a point near the parking lot where appellant was waiting. The two men were then observed to walk across the parking lot during which time Kanavalov handed something to appellant. When they reached the east end of the parking lot Agent Saiz observed appellant stoop down next to a parking bumper, as if he were picking something up,



and then appear to hand something to Kanavalov. The two men then parted company [R. T. 178-181].

On April 3, 1965, Agent Saiz again conducted foot surveillance in the same vicinity, and at approximately 8:00 - 8:30 p.m., he saw Kanavalov standing in front of the cafe at 7th and Lorena Streets. Agent Saiz then observed appellant on the southeast corner of 7th and Lorena, diagonally across from the cafe, whistling and motioning to Kanavalov. Kanavalov then was seen to cross the street, meet with appellant and together with appellant walk south on Lorena, on the east side of the street. While so walking, Agent Saiz observed that Kanavalov appeared to hand something to appellant just as they were directly in front of what Agent Saiz believed to be appellant's house at 1026 Lorena. At that time appellant turned into the yard and Kanavalov continued walking in a southerly direction. Agent Saiz then observed Kanavalov continue walking to the corner of Lorena and Atlantic and then return northerly on Lorena until he again met appellant, who was exiting from the same yard where he had entered minutes before. Upon meeting with Kanavalov, appellant handed something to Kanavalov and Kanavalov then continued to walk in a northerly direction, with appellant once again returning into the yard or into the house [R. T. 182-184].

Federal Bureau of Narcotics Agent John A. Frost testified as to the meeting between Agent Garcia, Kanavalov and himself on March 31, 1964, at which time Kanavalov was searched, provided with a radio transmitter, and furnished with \$120 of.



official advance Government funds. After proceeding to the alley at the rear of Marty's Bar on Whittier, Agent Frost maintained a surveillance and retained a receiving unit over which he was able to hear verbal transmissions by Kanavalov. Although Agent Frost heard Kanavalov's initial inquiries at Marty's Bar for "Indio", and subsequent comments by Kanavalov as to his progress as he was walking, Kanavalov thereafter walked out of radio range [R. T. 197-199]. Agent Frost was present subsequently when Kanavalov met with him and Agent Garcia, at which time Kanavalov delivered to Garcia the Exhibit 1 Series containing two rubber contraceptives of heroin [R. T. 200].

Agent Frost testified that on April 2, 1964, together with Agent Garcia, he again met with Kanavalov, and after searching Kanavalov, placing a radio transmitter on Kanavalov's person, concealed under his shirt, and furnishing him with \$180 official advance funds, the agents drove Kanavalov again to the same alley behind Marty's Bar. Agent Frost's car was equipped with a radio receiver capable of receiving transmissions from the transmitter on Kanavalov's person. Agent Frost then maintained his surveillance, and via the transmissions from Kanavalov, was able audially to follow Kanavalov into Marty's Bar and then to the corner of Whittier and Lorena [R. T. 201, 202]. After about fifteen minutes, Agent Frost heard the sound of a fire engine going by and then heard Kanavalov say "There's Indio; I am walking toward him." [R. T. 203]. Agent Frost testified as follows as to the ensuing meeting between Kanavalov and appellant [R. T. 203-204]:



"BY MR. SCHULMAN: You say you heard him meet someone. How did you hear him meet someone?

"A. My recollection is that Mr. Kanavalov said, 'I have been waiting for you,' and he says, 'Yeah,' a male voice responded, 'Yeah.'

"He said, 'There must have been a fire somewhere.'

"Then my recollection is that Mr. Kanavalov -- Then, the other male voice said, 'How many do you want?'

"Mr. Kanavalov said, 'Three.'

"He said, 'You got the bread, (do you have the money?')

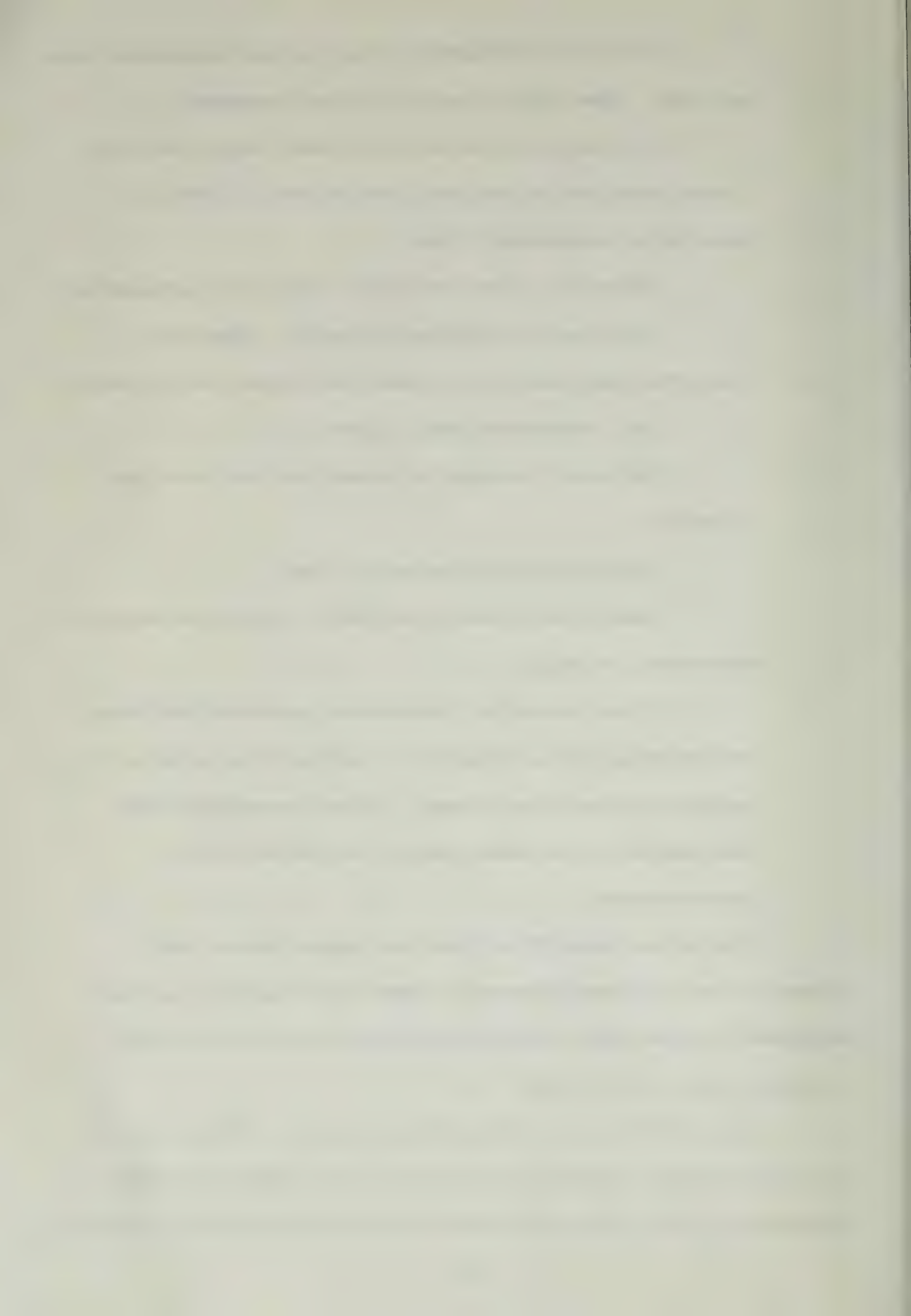
"And Mr. Kanavalov said, 'Yes.'

"And I heard him count \$180. I heard the sound of movement, walking.

"I then heard Mr. Kanavalov, as he walked away, transmitting to me, 'I have it. I am walking up the street and going around the corner.' I then transmitted this information to the other agents, via radio, as to developments."

Thereafter Agent Frost met with Agent Garcia and Kanavalov and observed Kanavalov hand Agent Garcia a package wrapped in green paper containing rubber contraceptives with powdery heroin [R. T. 204].

Agent Frost also testified that on April 3, 1964, he met with Agent Garcia and Kanavalov and that again Kanavalov was searched, a radio transmitter was placed on his person, and that



Kanavalov was furnished with \$240 of official advance advance [R. T. 205-206]. Agent Frost maintained a position of surveillance at 7th and Lorena Streets. Shortly thereafter he observed Kanavalov waiting at the corner of 7th and Lorena and then walking across the street. Agent Frost testified that while he was observing Kanavalov cross the street, he also heard Kanavalov say over the radio device "There's Indio, I am going over." [R. T. 206]. Agent Frost testified that he then saw and heard the following:

"THE WITNESS: Mr. Kanavalov then crossed the street and joined Mr. Hernandez. On his approach, he said something to the effect that 'I have been waiting for you.'

"He said, 'Yeah. How many do you want?'

"He said, 'A piece', Mr. Kanavalov said, 'A piece.'

"He said, 'Have you got the money?'

"Mr. Kanavalov said, 'Yes.'

"They walked south. I started to pick up radio interference and I moved my car at that time. I saw Mr. Hernandez. . . " [R. T. 206-207].

Agent Frost then testified that he moved his automobile to avoid radio interference, and in the process of doing so, saw the two men walking south on Lorena Street. Then, after driving around the block, he observed Kanavalov alone, walking north on Lorena, at a point just south of 1026 South Lorena Street. While driving north on Lorena from Atlantic, Agent Frost passed by

Kanavalov and again saw appellant coming from the south side of the house at 1026 South Lorena Street. Subsequently Agent Frost maintained surveillance on Kanavalov alone and then on appellant, after which he joined Agent Garcia and Kanavalov and with Agent Garcia examined a brown paper package containing four rubber contraceptives. The contraceptives contained heroin [Exhibit 3 series] [R. T. 204-209].

Federal Bureau of Narcotics Agent Harrison D. Paulus testified that at approximately 9:00 p.m., April 14, 1964, together with Agent Harry Watson, he conducted surveillance in the vicinity of Lorena and Whittier. Shortly thereafter they observed appellant leave a residence at 3448 Whittier Boulevard, walk to a vehicle, pick up a package and return to the building. The agents proceeded to the front steps of the apartment and while there the door was opened by one Margaret Cerna. Agent Paulus identified himself and Agent Watson as agents of the Federal Bureau of Narcotics and advised the woman that they intended to arrest appellant. Then, seeing appellant sitting at a kitchen table, the agents arrested appellant and searched his person [R. T. 226-228]. Agent Paulus testified that at the time that they went to the building to arrest appellant, they were under instructions that there was a warrant outstanding for appellant's arrest [R. T. 229]. Agent Paulus also was aware of the various facts relating to the events of March 31st, April 2nd and April 3rd, involving appellant and Kanavalov [R. T. 229]: It was stipulated that in fact no warrants of arrest had in fact been



issued [R. T. 243].

Subsequent to the arrest and the search of appellant the agents searched the small apartment and found in excess of \$1,200 hidden on the premises. Appellant, when confronted with the money denied that the money was his and stated that he did know whose it was. Miss Cerna similarly told the agents that she had no knowledge about the money or where it had come from [R. T. 231-234]. By comparison of the serial numbers on the various bills with lists of the serial numbers of the specific bills which had been advanced to Kanavalov on each of the three dates, March 31, April 2 and April 3, the agents determined that three one dollar bills had corresponding serial numbers as those on the list prepared relative to the monies advanced Kanavalov on April 2, 1964 [Exhibits 5 and 5A].

Appellant presented only himself as a trial witness on his own behalf. As a part of his direct testimony, appellant admitted the following: that he had known Kanavalov for more than a year; that during the latter part of March, 1964, Kanavalov asked appellant if he had any heroin and in response thereto appellant told him in effect to go away and not to bother him, and that after several inquiries, appellant then hit Kanavalov in the stomach [R. T. 248-251]. Appellant further testified that on March 31, Kanavalov again approached appellant and asked to buy one or two rolls of "bennies" (which appellant later defined as "pep pills" or benzedrine) [R. T. 261]. Appellant said that he agreed and told Kanavalov to meet him at the cafe. Appellant testified that he had



"three rolls of bennies", and thereafter unsuccessfully looked for Kanavalov and when he finally found him he told Kanavalov "that there was nothing doing." [R. T. 251-252]. Appellant further testified that he met Kanavalov again on April 2nd, and sold him "two rolls" [R. T. 252]; and that on April 3rd he again met Kanavalov who told appellant that he wanted a "piece", which appellant defined as being " . . . a bag with a thousand in them". According to appellant, Kanavalov gave appellant \$3 on April 2nd for the two rolls. Appellant denied that he ever discussed the subject of heroin or ever sold or gave heroin to Kanavalov at any time, or that he himself had possessed any heroin during the period in question [R. T. 253-254].

On cross-examination appellant testified that he had previously sold heroin in 1956 to a State undercover agent and that he had also been convicted on a charge of selling "nine caps" of heroin [R. T. 254-256]. When asked to define "a quarter", appellant hedged and defined same as being "25 cents" [R. T. 255]. Similarly, when asked whether or not "a piece" means anything else in the narcotics jargon other than an ounce of heroin, appellant avoided a direct response by replying that " . . . a piece, a piece means anything . . . It means a lot of things . . . I can say a piece of candy, a piece of a girl." [R. T. 256-257].

Appellant also testified on cross-examination that on March 31, 1964, when Kanavalov asked appellant to sell him "bennies" he (appellant) was at that time engaged in the business of selling "bennies" to "a few people" [R. T. 258] and that he had no

other occupation [R. T. 257-258].

Appellant, contrary to the direct testimony of Kanavalov, Saiz and Katz, denied meeting with Kanavalov on March 31, 1964 in front of the cafe and squatting down at the curb with Kanavalov, or that he received any money from Kanavalov at such time; or that after crossing the street with Kanavalov at 7th and Lorena, he pointed at any object with his foot for Kanavalov to pick up. Appellant also testified that if Kanavalov bent down and picked anything up at that point, he appellant " . . . didn't notice." [R. T. 261].

According to appellant's testimony on cross-examination, when he met with Kanavalov on April 2nd, it was at this time that he went over "underneath the parking lot" to get "two rolls" from a place where he had hid them, and gave them to Kanavalov in exchange for three \$1 bills [R. T. 262-263].

Appellant admitted that the \$1200 recovered during the search was his, and that he had gotten it about three months earlier from a landscaping business. He also admitted, without explaining, that he did not normally keep money deposited in different hiding places around a house [R. T. 258-259].

Later in his cross-examination, appellant admitted that the term "a piece" as used on the street more commonly is used to mean an ounce of heroin than "a thousand bennies" [R. T. 264-265].

According to appellant, at the meeting on April 3rd, he did not deliver any heroin to Kanavalov, but rather after walking to his house and after Kanavalov returned from the corner, appellant

The first of these is the fact that the United States is a young nation, and its history is therefore a history of growth and development. The second is the fact that the United States is a large nation, and its history is therefore a history of expansion and conquest. The third is the fact that the United States is a diverse nation, and its history is therefore a history of conflict and compromise. The fourth is the fact that the United States is a nation of immigrants, and its history is therefore a history of assimilation and adaptation. The fifth is the fact that the United States is a nation of pioneers, and its history is therefore a history of exploration and discovery. The sixth is the fact that the United States is a nation of entrepreneurs, and its history is therefore a history of innovation and invention. The seventh is the fact that the United States is a nation of reformers, and its history is therefore a history of social and political change. The eighth is the fact that the United States is a nation of idealists, and its history is therefore a history of high aspirations and noble dreams. The ninth is the fact that the United States is a nation of pragmatists, and its history is therefore a history of practical solutions and real-world results. The tenth is the fact that the United States is a nation of optimists, and its history is therefore a history of hope and faith in the future.

THE HISTORY OF THE UNITED STATES

The history of the United States is a story of a nation that has grown from a small colony of immigrants to a great power that spans the globe. It is a story of a nation that has fought for freedom and justice, and that has stood up to tyranny and oppression. It is a story of a nation that has made great contributions to the world, and that has inspired people everywhere. It is a story of a nation that has overcome many challenges, and that has emerged stronger and more united than ever before. It is a story of a nation that has a bright future, and that has the potential to make the world a better place for everyone. The history of the United States is a story of hope and faith, and of the power of the human spirit. It is a story that should inspire us all, and that should remind us of the great things that we are capable of achieving. The history of the United States is a story that belongs to all of us, and that should be a source of pride and inspiration for every American. The history of the United States is a story that is still being written, and that has the potential to be one of the greatest stories of all time.

The history of the United States is a story of a nation that has grown from a small colony of immigrants to a great power that spans the globe. It is a story of a nation that has fought for freedom and justice, and that has stood up to tyranny and oppression. It is a story of a nation that has made great contributions to the world, and that has inspired people everywhere. It is a story of a nation that has overcome many challenges, and that has emerged stronger and more united than ever before. It is a story of a nation that has a bright future, and that has the potential to make the world a better place for everyone. The history of the United States is a story of hope and faith, and of the power of the human spirit. It is a story that should inspire us all, and that should remind us of the great things that we are capable of achieving. The history of the United States is a story that belongs to all of us, and that should be a source of pride and inspiration for every American. The history of the United States is a story that is still being written, and that has the potential to be one of the greatest stories of all time.

pointed to the ground to indicate to appellant where he had hidden a sack of 1,000 bennies, which he was selling to Kanavalov. Appellant testified that he received \$40 from Kanavalov for these bennies, which was the going price at the time.

IV

ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE
ITS DISCRETION IN DENYING APPELLANT'S
MOTION FOR BILL OF PARTICULARS.

Appellant filed a motion for Bill of Particulars prior to trial, in which he requested the following:

"I. The exact place at which the alleged crime is alleged to have been committed.

"II. The exact date and time at which each of the alleged crimes is alleged to have been committed.

"III. The name or names of each person to whom defendant is alleged to have furnished or sold the narcotic heroin.

"IV. The names of each and every person who was present at the time of the commission of the alleged crimes."
[C. T. 8].

Although appellant states in his opening brief that "It was adduced that the above information was vital to the preparation of

THE
LIBRARY OF THE
MUSEUM OF NATURAL HISTORY
AND
ZOOLOGY
OF THE
CITY OF LONDON

THE
LIBRARY OF THE
MUSEUM OF NATURAL HISTORY
AND
ZOOLOGY
OF THE
CITY OF LONDON

THE
LIBRARY OF THE
MUSEUM OF NATURAL HISTORY
AND
ZOOLOGY
OF THE
CITY OF LONDON

THE
LIBRARY OF THE
MUSEUM OF NATURAL HISTORY
AND
ZOOLOGY
OF THE
CITY OF LONDON

THE
LIBRARY OF THE
MUSEUM OF NATURAL HISTORY
AND
ZOOLOGY
OF THE
CITY OF LONDON

an adequate defense", 3/ such conclusion is mere presumptuousness on the part of appellant. There was absolutely no showing made by appellant of the existence of "cause" for the granting of the motion or wherein such information would be otherwise necessary to his defense.

A motion for a bill of particulars is addressed to the sound discretion of the trial court, and the exercise of that discretion will not be disturbed on appeal unless it has been abused.

Yeargain v. United States, 314 F.2d 881 (9th Cir. 1963);

Wong Tai v. United States, 273 U.S. 77, 82; 47 S. Ct. 300, 71 L. Ed. 545 (1927);

Schino v. United States, 209 F.2d 67, 69 (9th Cir. 1954) cert. den. 347 U.S. 937;

Kobey v. United States, 208 F.2d 583 (9th Cir. 1953);

Remmer v. United States, 205 F.2d 277, 281 (9th Cir. 1953);

Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949) cert. den. 338 U.S. 860.

Rule 7(f) of the Federal Rules of Criminal Procedure provides in pertinent part:

"The court for cause may direct the filing of a bill of particulars."

The moving party has the burden of showing the existence of

3/ Appellant's Opening Brief, page 3.

"cause".

United States v. Hudson, 176 F. Supp. 323

(D. C. M. D. Ga. 1959);

United States v. Callahan, 18 F. R. D. 486

(D. C. W. D. Wash. 1955).

It is not the function of a bill of particulars to lay before the defendant the Government's entire case in all its details and ramifications, or to compel the Government to disclose in advance of trial the evidence by which it will attempt to prove the charges alleged in the indictment.

Remmer v. United States, supra, at page 282;

Wong Tai v. United States, supra;

Todorow v. United States, 173 F.2d 439 (9th Cir. 1949);

Frederick v. United States, 163 F.2d 536, 545

(9th Cir. 1947), cert. den. 332 U.S. 775;

Robinson v. United States, 33 F.2d 238, 240 (9th Cir. 1929);

Rubio v. United States, 22 F.2d 766 (9th Cir. 1927).

In Nye & Nissen v. United States, 168 F.2d 846, 851 (9th Cir. 1948), aff'd 336 U.S. 613, this Court stated:

"The information requested * * * appears to concern the details of the evidence which was to be relied upon by the evidence which was to be relied upon by the government in support of its charges: the time, places and persons involved in various evidentiary transactions, etc.

" * * * Although it may be true that defendants could not have known in advance of trial what various facts and circumstances were to be relied upon by the government * * * , this does not necessarily indicate that they were prejudiced by the denial of the motion. The government should not be compelled by a bill of particulars to make a 'complete discovery' of its entire case. "

See also United States v. Mangiaracina, 92 F.Supp. 96,
10 F.R.D. 415 (W.D. Mo. 1950).

And in Yeargain v. United States, supra, it was held:

"A defendant is not entitled to know all the evidence the government intends to produce, but only the theory of the government's case. "

The proper function of a bill of particulars is to state facts beyond those alleged in the indictment so that the offense involved is sufficiently identified (1) to enable defendant to plead a conviction or acquittal thereon in bar of a second prosecution for the same offense, and (2) to fairly apprise the defendant of the nature of the charge so that he may prepare his defense and not be prejudicially surprised at the trial.

Yeargain v. United States, supra;

Remmer v. United States, supra, judgment vacated
and remanded on other grounds, 347 U.S. 227.

Subsequent history not relevant.

Todorow v. United States, supra;

United States v. Ansani, 240 F.2d 216, 223 (7th Cir.

The first part of the history of the United States is the history of the colonies. The colonies were founded by Englishmen who had come to America in search of a better life. They were at first dependent on England for everything they needed. But as the colonies grew, they began to think of themselves as separate and equal to England. They wanted to make their own laws and to elect their own representatives. This led to a series of conflicts with England, which finally resulted in the American Revolution. The colonies declared their independence from England in 1776. They then fought a war to win their independence. The war ended in 1781, when the British surrendered to the Americans at Yorktown. The American Revolution was a great success. It proved that a group of people could break away from a powerful empire and create a new nation. The new nation was the United States of America. The second part of the history of the United States is the history of the early years of the new nation. The United States was a young country in 1781. It had just won its independence from England. It was a country of small, poor farmers and a few wealthy planters. It was a country that was still very much dependent on England. But the Americans were determined to build a new nation. They wanted to create a government that would protect their rights and interests. They drafted a new constitution in 1787. This constitution created a new government for the United States. It was a government of three branches: the executive, the legislative, and the judicial. The executive branch was headed by the President. The legislative branch was made up of the House of Representatives and the Senate. The judicial branch was headed by the Supreme Court. The new government was a great success. It proved that a group of people could create a new government from scratch. The third part of the history of the United States is the history of the early years of the new nation. The United States was a young country in 1781. It had just won its independence from England. It was a country of small, poor farmers and a few wealthy planters. It was a country that was still very much dependent on England. But the Americans were determined to build a new nation. They wanted to create a government that would protect their rights and interests. They drafted a new constitution in 1787. This constitution created a new government for the United States. It was a government of three branches: the executive, the legislative, and the judicial. The executive branch was headed by the President. The legislative branch was made up of the House of Representatives and the Senate. The judicial branch was headed by the Supreme Court. The new government was a great success. It proved that a group of people could create a new government from scratch.

1957), cert. den. 353 U.S. 936;
United States v. Lebron, 222 F.2d 531 (2d Cir. 1955)
cert. den. 350 U.S. 876;
Kaufman v. United States, 163 F.2d 404, 408 (6th Cir.
1947), cert. den. 333 U.S. 857;
Sawyer v. United States, 89 F.2d 139, 140 (8th Cir.
1937).

Appellant, relying on a procedural rule of the State of California, (Penal Code Section 943) urges that the indictment was itself faulty in that the names of the witnesses who appeared before the grand jury were not indorsed upon the face of the indictment. (Appellant's Opening Brief, page 13; citing People v. Breen, 130 Cal. 72 (1900) and other cases.) No attack was made upon the indictment below, and of course the state rule relied upon by appellant is quite contrary to the established rules of federal criminal procedure.

**Rules 6 and 7, Federal Rules of Criminal
Procedure, Title 18, United States Code.**

As noted, supra, in appellee's Statement of the Case, appellee did voluntarily provide for appellant as a part of its trial memorandum, extensive detail as to the date, the time and other information relating to each of the several transactions. The appellant was entitled to no more.

It is submitted that the motion for bill of particulars was properly denied.

B. THE EVIDENCE PRESENTED AT
TRIAL IS SUFFICIENT TO SUSTAIN
APPELLANT'S CONVICTION.

Appellant has raised as "Point II" on this appeal a question which, as phrased, has no significance to the issues in this case. It is contended on page 16 of Appellant's Opening Brief that "The Informer, Because of His Background and Personal Interest, was not a Reliable Informer."

Although appellant purports to attack Kanavalov's reliability, no argument is even advanced by appellant wherein Kanavalov's purported non-reliability would be a basis for reversal of appellant's conviction. Appellant argues non-reliability in a vacuum.

This is not a case where physical evidence, or confessions were obtained by searches and seizures, the only probable cause for which information was provided by a "reliable informer." The California cases cited by appellant for such a problem are thus inapplicable to the case at bar. No such evidence was seized during any of the instant transactions nor did appellant confess to or admit to any of the details of his crimes.

Cf. Draper v. United States, 358 U.S. 307 (1959);
 Costello v. United States, 298 F.2d 99 (9th Cir. 1962).

Nor can appellant here question Kanavalov's "reliability" in terms of credibility of belief by the trial court of Kanavalov's testimony. The credibility and the weight to be given their testimony is a matter within the province of the trial court which has seen and heard the witnesses.

Stoppelli v. United States, 183 F.2d 391 (9th Cir.

THE HISTORY OF THE
CITY OF BOSTON
FROM 1630 TO 1800

The history of the city of Boston from 1630 to 1800 is a story of growth and change. It begins with the arrival of the first settlers in 1630, who found a small fishing village. Over the years, the city grew into a major center of commerce and industry. The story is one of the struggles of a young colony to establish itself in a new land.

The early years of the city were marked by hardship and struggle. The settlers faced many difficulties, including lack of food and shelter. They were also often at odds with the Native Americans, who viewed them as intruders on their land.

Despite these challenges, the city grew and prospered. It became a major center of commerce and industry. The story is one of the struggles of a young colony to establish itself in a new land. The city's growth was fueled by its location on a major waterway, which allowed it to trade with other parts of the world.

The city's growth was also fueled by its reputation as a center of learning and culture. It was home to many of the leading universities and colleges of the time. The city's reputation as a center of learning and culture attracted many people from other parts of the world.

The city's growth was also fueled by its reputation as a center of commerce and industry. It was home to many of the leading businesses and industries of the time. The city's reputation as a center of commerce and industry attracted many people from other parts of the world.

The city's growth was also fueled by its reputation as a center of learning and culture. It was home to many of the leading universities and colleges of the time. The city's reputation as a center of learning and culture attracted many people from other parts of the world.

The city's growth was also fueled by its reputation as a center of commerce and industry. It was home to many of the leading businesses and industries of the time. The city's reputation as a center of commerce and industry attracted many people from other parts of the world.

The city's growth was also fueled by its reputation as a center of learning and culture. It was home to many of the leading universities and colleges of the time. The city's reputation as a center of learning and culture attracted many people from other parts of the world.

1950), cert. den. 340 U.S. 864;

Norfolk v. McKenzie, 116 F.2d 632 (6th Cir. 1941).

In this case the evidence overwhelmingly pointed to appellant's integral, willing and complete involvement in each of the three narcotics transactions upon which the indictment was premised. The trial court was not faced with balancing contrary opinions or evidence in any significant regard. The Government's case was firmly established by numerous percipient witnesses as to each of the details involved; and appellant's obvious false and fanciful testimony certainly evidenced and cinched the conclusion for the trial court that appellant was guilty as charged, on each of the six counts, beyond a reasonable doubt.

On appeal, when considering an attack upon the sufficiency of the evidence, the appellate court must view the evidence at trial taken in the light most favorable to the Government, together with all reasonable inferences which may be drawn therefrom.

Noto v. United States, 367 U.S. 290 (1961);

Glasser v. United States, 315 U.S. 60 (1942);

Stein v. United States, 337 F.2d 825 (9th Cir. 1964);

Byrnes v. United States, 327 F.2d 825 (9th Cir. 1964)

cert. den. 377 U.S. 970.

If the court then finds substantial evidence, it must presume the findings of the trier of fact to be correct and the judgment must be sustained.

Noto v. United States, supra;

Ingram v. United States, 360 U.S. 672, 678 (1959);

Kotteakos v. United States, 328 U.S. 750, 763-764
(1946);

Glasser v. United States, supra.

The evidence was indeed sufficient to support the judgment of conviction.

C. APPELLANT'S ARREST WAS PROPER
AND BASED UPON PROBABLE CAUSE.

Appellant raises in his Point III the concern that appellant was arrested without benefit of a warrant, and that at the time the arrest was made, the arresting agent was erroneous in his understanding and belief that an arrest warrant had been issued. 4/

Once again, appellant raises a procedural point without any direction as to the error alleged to have been committed by the court below.

Certainly under federal statutes federal narcotics agents are empowered to make an arrest without a warrant if they have reasonable grounds to believe that the person to be arrested has committed or is committing violations of the federal narcotics laws;

Title 26, United States Code, Section 7607;

Williams v. United States, 273 F.2d 781 (9 Cir.
1959);

Santiago v. United States, 327 F.2d 573 (2d Cir.
1964);

United States v. Volkell, 251 F.2d 333 (2d Cir. 1958)

4/ Appellant's Opening Brief, pages 17-18.

and, even in the absence of an applicable statute, inasmuch as the Supreme Court has held that " . . . the law of the state where an arrest without warrant takes place determines its validity", the arrest of appellant would quite properly have been justified under California Penal Code Sections 830 and 844.

Cf. People v. Maddox, 46 Cal. 2d 301 (1956), cert.

denied 352 U.S. 85, 89.

That "reasonable grounds" or "probable cause" existed for appellant's arrest is beyond question - and appellant has not questioned same. These terms have been oft-defined, and the circumstances of this case, as known to the arresting agents at the time they made the arrest [R. T. 229], fully supports the conclusion that the arrest was proper. As stated in Brinegar v. United States, 338 U.S. 160 (1949), at page 175:

"In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.

"The substance of all the definitions 'of probable cause' is a reasonable ground for belief of guilt . . . (citations omitted) . . . And this 'means less than evidence which would justify condemnation' or conviction . . . Since Marshall's time, at any rate, it has come to mean more

than bare suspicion: Probable cause exists where 'the facts and circumstances within their [the officers] knowledge and of which they had reasonably trust-worthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed "

Draper v. United States, 358 U.S. 307 (1959);

Go-Bart v. United States, 282 U.S. 344 (1931);

Husty v. United States, 282 U.S. 694 (1931);

Dumbra v. United States, 268 U.S. 435 (1925);

Carroll v. United States, 267 U.S. 132 (1925).

Appellant's citation of Miller v. United States, 357 U.S. 301, 308 (1958) is misguided. The decision in that case related to an unlawful manner of making an arrest, i. e. breaking down a door and entering without the officers first stating their authority and purpose for demanding admission. In the instant case the door to the apartment had been opened by Mrs. Cerna just as the agents arrived on the front steps of the building. The agents properly identified themselves and announced their intention to arrest appellant. It was only then that the agents, in a non-forcible manner, entered the apartment and arrested appellant. [R. T. 227-228].

The arrest being lawful, the only fruits of the arrest, the three \$1 bills, seized at Mrs. Cerna's house, were properly received into evidence.

United States v. Rabinowitz, 339 U.S. 56 (1950).

D. IT IS IMMATERIAL TO THIS CASE
 THAT AT THE TIME OF APPELLANT'S
 ARREST HE WAS NOT FULLY ADVISED
 OF HIS RIGHTS.

Appellant has again reached into the air; this time for the cloak of the Escobedo decision, and has claimed protection from its doctrine (United States v. Escobedo, 378 U. S. 478 (1964)).

In Point III of appellant's brief he complains that "At The Time Of His Arrest, Defendant Was Not Advised of His Rights". 5/

Appellant does not however suggest or even argue wherein this failure on the part of the arresting agents deprived appellant of a fair trial, or wherein such failure serves as a possible basis for reversal of appellant's conviction. Unlike Escobedo, and the cases which follow, dealing with the inadmissibility of confessions or admissions made by a defendant at a time when he was not fully advised of his right to counsel, we have no such "illegally obtained" evidence in this case. There were no confessions. There were no admissions.

The point is absolutely without merit.

E. APPELLANT WAS NOT DENIED THE
 RIGHT TO SUBPOENA WITNESSES.

As noted in appellee's Statement of the Case, appellant at no time prior to trial applied for or attempted to apply for the issuance of any subpoenas for defense witnesses.

Rule 45, Federal Rules of Civil Procedure.

5/ Appellant's Opening Brief, pages 18-19.

It was only after the Government's case in chief had concluded that appellant's counsel asked for a continuance to secure the attendance of three persons, one residing in Los Angeles, another in San Francisco and a third somewhere in Chihuahua, Mexico. The names of these persons were obviously known to appellant and to his counsel, through independent means, there having been no reference or mention whatever of their names in the Government's case in chief.

Even after the completion of Kanavalov's testimony - the first day of trial - no effort was made by appellant to seek the issuance of subpoenas for any of these persons. Certainly if their testimony would have had any bearing on the case relating to possible impeachment of Kanavalov's testimony, or otherwise, such knowledge would have been clear to appellant and to his counsel at that time. Nor can appellant again rely on the court's refusal to grant a bill of particulars as basis for his claim that he could not foresee the need for these witnesses prior to the trial. The indictment and the Government's trial memorandum clearly set the stage for the transactions which the Government intended to prove.

The only relevance of the purported testimony of these three witnesses would have been, as stated by appellant's counsel, i. e., "These witnesses would testify to I think a very material fact, that is a conversation, a disagreement between the defendant and the informer in this case" (Emphasis added) [R. T. 246]. That such testimony would have aided appellant in disproving the

clear and heavily corroborated evidence of his being a trafficker in heroin, is most improbable. At the very most, perhaps, a showing might have been made to suggest a bias on the part of Kanavalov against appellant. But bias or not appellant did sell and conceal heroin as charged.

The case of Rogers v. United States, 340 U. S. 367, 370 (1960) cited by appellant, dealt solely with a contempt conviction arising out of the defendant's improper invocation of the Fifth Amendment. The decision has no bearing on the instant case.

The motion for continuance was properly denied, and appellant can claim no prejudice as a result of his failure to timely produce his witnesses.

F. THE COURT COMMITTED NO PREJUDICIAL MISCONDUCT IN RENDERING ITS JUDGMENT.

Appellant claims prejudice in that the trial court adjudged him to be guilty as charged. No further argument is made to specify wherein such prejudice occurred.

If what appellant is suggesting is that he was deprived of his opportunity to argue the case to the court, such a contention would be without support. It is true that at the completion of all of the evidence, the court without asking for argument from counsel, made its finding of guilt. It is similarly true, however, that upon being asked for the opportunity of argument, the court vacated its ruling and heard whatever argument counsel for appellant had to make. Thereafter, satisfied that its original judgment was correct, the judgment of guilty was once again

pronounced by the court. [R. T. 277].

Here the court had heard all of the evidence, sitting without a jury, in less than two days. As the court observed subsequent to its first ruling:

" . . . We have run right through, and with the case in the court's mind, it is beyond any question of reasonable doubt, and I didn't see any need for argument. We started yesterday and we have had it today . . . " [R. T. 272].

Nevertheless, the court bowed to the request of appellant's counsel and permitted him to be heard and to argue his cause.

It is submitted that such a procedure would indeed be a weak basis for appellant to claim denial of "effective assistance of counsel", and that such a contention is indeed a frivolous effort to impugn appellant's conviction.

V

CONCLUSION

For the reasons stated, the judgment of the District Court should be affirmed.

Respectfully submitted,

MANUEL L. REAL,
United States Attorney,
JOHN K. VAN DE KAMP,
Assistant United States Attorney,
Chief, Criminal Division,
J. BRIN SCHULMAN,
Assistant United States Attorney,
Assistant Chief, Criminal Division,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Michael P. Balaban
MICHAEL P. BALABAN

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 20311

DAVID LEROY DANIELS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

APPELLANT'S OPENING BRIEF

FILED

J. B. TIETZ

JAN 6 1966

410 Douglas Building

257 S. Spring Street

Los Angeles, California

WILLIAM E. WILSON, Clerk

Attorney for Appellant

INDEX

Jurisdiction	1
Statement of the Case	2
The Facts	4
Questions Presented and How Raised	4
Specification of Errors	5
Summary of Argument	5
Argument—	
I. Appellant exhausted his administrative remedies and was in a posture to present his defenses to the indictment	6
A. Bjorson is wrong	7
B. Bjorson is distinguishable	21
II. There was no basis in fact for denying appellant's claim for a minister's classification	23
Conclusion	27

TABLE OF CASES

<i>Barnette v. West Virginia State Board of Education</i> , 47 F. Supp. 251 (S.D. W. Va. 1942)	20
<i>Billings v. Truesdell</i> , 321 U.S. 542, 558, 559 (1944)	9, 10
<i>Bjorson v. United States</i> , 272 F.2d 244 (9th Cir. 1959), cert. denied 362 U.S. 949 (1960)	7, 8, 18, 19, 20, 21
<i>Cohen, Ex Parte</i> , 254 Fed. 711	16
<i>Delaware & Hudson Co. v. Albany & Susq. R. Co.</i> , 213 U.S. 435 (1908)	16
<i>Dickinson v. U. S. A.</i> , 74 S. Ct. 152, 159	6, 24
<i>Dodez v. U. S.</i> , 329 U.S. 338, 342-343, 345, 347 (1946)	7, 8, 9, 11, 20
<i>Donato v. U. S.</i> , 9 Cir., 1962, 302 F.2d 468, 470	6
<i>Estep v. U. S.</i> , 327 U.S. 114, 115-116 (1946)	8, 9
<i>Falbo v. U. S.</i> , 320 U.S. 549 (1944)	7, 8, 9, 11
<i>Gobitis v. Minersville School District</i> , 310 U.S. 586 (1940)	21

<i>Johnston v. United States</i> , 351 U.S. 215 (1956)	19
<i>Mason v. United States</i> , 9th Cir., 1955, 218 F.2d 375	23
<i>N.L.R.B. v. Carlisle Lumber Co.</i> , 94 F.2d 138	16
<i>N.L.R.B. v. Sunshine Mining Co.</i> , 110 F.2d 780	16
<i>U. S. v. Carver</i> , 260 U.S. 482, 490 (1923)	20
<i>U. S. v. Dicke</i> , S. Dist. of Calif. No. 34998	22
<i>Utley v. St. Petersburg</i> , 292 U.S. 106 (1934)	16

ACTS OF CONGRESS

Section 4 (a) of the Act (U.M.T.&S. Act)	15
Sec. 16, Title I (U.M.T.&S. Act)	25
Title 18, Section 3231, United States Code	1
50 U.S.C. App., § 454	15
50 U.S.C., § 451 (c)	20

RULES OF COURT

Rule 27 (a) (1) and (2) Fed. Rules of Crim. Proc.	1
--------------------------------------------------------	---

AGENCY REGULATIONS

1622.10	24
1622.43	24
1623.2	24
§ 1628.10	15
§ 1628.11	15
§ 1628.17	15
1628.25	15
1650.30	15
32 C.F.R. §§ 1628.10, 1628.11, 1628.17, 1628.25, 1659.30	15

BOOKS

<i>Robertson and Kirkham—Jurisdiction of the Supreme Court of the United States</i> , Wolfson and Kurland, New York, Matthew Bender & Co., 1951 (page 60)	20
22 Oregon L. Rev. 198 (1943)	21
17 Tulane L. Rev. 497 (1943)	21

United States Court of Appeals

FOR THE NINTH CIRCUIT.

No. 20311

DAVID LEROY DANIELS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

APPELLANT'S OPENING BRIEF

This is an appeal from a judgment rendered and entered by the United States District Court for the Southern District of California, Northern Division. The appellant was sentenced to custody of the Attorney General for a period of three years (R. 7).¹ Title 18, Section 3231, United States Code, conferred jurisdiction in the district court over the prosecution of this case. This court has jurisdiction of this appeal under Rule 27 (a) (1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law (R. 9).

1. R. refers to the typed Transcript of Record.

STATEMENT OF THE CASE

The indictment charged appellant with violation of the Universal Military Training and Service Act (R. 2-3). It was alleged that he became a registrant of Local Board No. 68 of the Selective Service System in the County of Fresno, State of California, and that having theretofore been duly classified in Class I-O, did knowingly refuse and fail to comply with the order of his said Local Board No. 68 to report to said board for instructions concerning civilian work (R. 2-3).

Appellant pleaded not guilty, waived jury trial and was tried and convicted on June 18, 1965 (R. 6). Judgment was pronounced on August 2, 1965 (R. 7).

A written motion for judgment of acquittal was filed (R. 4-5). The motion was denied (R. 6).

The motion and the hereinafter specified references to the trial proceedings (Rep. Tr.)² contain all of the grounds that the appellant relies upon for reversal of the judgment in this case.

Defendant called Jay Hathaway, a state official of the Selective Service System, but officed in Fresno with defendant's local board, as a witness. His testimony was that there was no one at the local board's office to give the defendant any test (medical, psychological, mental or otherwise) before sending him on to the designated place of employment (Rep. Tr. 12).

2. Rep. Tr. refers to the (complete) reporter's transcript of the trial proceedings.

Defendant called Bernie Lee Daniels as a witness (R. 6) to show that the evidence of defendant concerning his ministry, in his Selective Service file (Ex.)³ needed certain clarifications. The parties then stipulated the witness Daniels would testify that "pioneers" are witnesses who do 100 or more hours a month of field ministry work and that "vacation pioneers" are short term pioneers, and are required to do 75 or more field hours of ministry work each two weeks (Rep. Tr. 21-22).

Defendant, by permission of the court, proffered the following: "If permitted to testify the defendant would testify that his vocation is the ministry, that anything else he does to support himself is to earn bread for his vocation; that it is his lifetime work and that everything else is secondary to it; that in everything he did this was true; that he took the kind of secular work that permitted him to carry on his vocation in the evenings and on the weekends and he took the kind of jobs that permitted him to do as much pioneering as possible." (Rep. Tr. 47).

The trial court, nevertheless, ruled that none of defendant's evidence could be considered in defense to the indictment since he had not gone to the local board office, as ordered (Rep. Tr. 36).

3. Ex. refers to the Government's exhibit, the selective service file of appellant. An Arabic number is the pagination which is found pencilled at the bottom of each sheet of the exhibit.

THE FACTS

Appellant was registered with the Selective Service System on November 10, 1960 (Exs. 1-2).

He signed Series VIII of the Classification Questionnaire (Ex. 7), thereby asserting he was a conscientious objector. He made the following entries in Series VII, the portion of the questionnaire relating to ministry:

"I am a minister and I have been formally ordained." (Ex. 7). He added a full sheet of particularization to support this statement (Ex. 9).

The first (and only) classification given him was I-O, that is, conscientious objector. He requested an Appearance Before Local Board and an appeal. These were given him but both his efforts were fruitless.

The local board sent him an order to report to its office in Fresno, the order informing him he would "be given instructions to proceed to the place of employment.", the name and address of the place of employment being specified in said order (Ex. 99). He had previously informed the board he could not do this work "due to my convictions" (Ex. 86) and he did not go to the local board's office.

QUESTIONS PRESENTED AND HOW RAISED

I

The record shows the court agreed with plaintiff that the failure of the defendant to report at the local board was a failure to exhaust administrative remedies (Rep. Tr. 23,

48). Should this have precluded defendant from presenting his defenses? The question was presented by the trial court's ruling.

II

The "merits" of defendant's points were not considered, because of the above threshold question (R. 48). Assuming defendant's Selective Service file (Ex.) and his oral evidence (R. 9, 18) support his motion for judgment of acquittal, namely, the denial of the claim for exemption as a minister of religion by the Selective Service System is without basis in fact, arbitrary, capricious and contrary to law (R. 4, point 2) was there a basis in fact for denying him a deferred classification?

SPECIFICATION OF ERRORS

I

The district court erred in failing to grant the motion for judgment of acquittal.

II

The district court erred in convicting the defendant and entering a judgment of guilty against him

SUMMARY OF ARGUMENT

I

The court should not have rejected appellant's evidence but should have rejected the government's argument, namely, that his failure to go to the local board, as ordered, was a failure to exhaust his administrative remedies and

that he was thereby precluded from presenting his defenses. *Donato v. United States*, 9 Cir., 1962, 302 F.2d 468, 470.

The two or three cases that hold a I-O registrant so ordered to report must report to the office of the local board are distinguishable from the facts of our case; moreover, those cases were in themselves wrongly decided.

II

Defendant-appellant made out a prima facie case, *Dickinson v. United States*, 1953, 74 S. Ct. 152, 157-158, and there is nothing in the record to rebut his evidence, *Dickinson*, at 159.

ARGUMENT

I

Appellant Exhausted His Administrative Remedies and Was in a Posture to Present His Defenses to the Indictment.

This threshold problem is dispositive of the appeal. If this Court disagrees with appellant's argument his second point (on the merits of his defense) need not be considered. If this Court agrees with his argument his conviction should be reversed.

Appellant had an administrative appeal (R. 11, 76) and therefore exhausted his administrative remedies.

We will argue (A) that this Court should take a hard look at its prior decision on this subject and (B) that, in any event, this case is distinguishable from its prior decision.

A.

Bjorson Is Wrong

Appellant had been ordered to report for an armed forces physical examination, as required by the regulations, on June 2, 1964 (R. 62). A statement of acceptability by the armed forces was entered (R. 74). The report of the examination, giving details, appears in the Selective Service file at pages 65-72. Neither the order to report for work of national importance nor the regulations commanding a compliance provided for the appellant to be reexamined at the hospital (R. 99). It merely stated that he would be given instruction to proceed to the state hospital at Los Angeles and "you will be instructed as to your duties at the place of employment." (R. 99).

The opinion of this court in *Bjorson v. United States*, 272 F.2d 244 (9th Cir. 1959), cert. denied 362 U.S. 949 (1960), is out of harmony with and in direct conflict with the holding of the Supreme Court in *Dodez v. United States*, 329 U.S. 338, 342-343, 345, 347 (1946). The Court held that Bjorson failed to go to the "brink." The Court erroneously equated the facts in the case to *Falbo v. United States*, 320 U.S. 549 (1944), whereas the facts are identical to the facts in *Dodez v. United States*, 329 U.S. 338 (1946). The regulations involved in this case and the regulations involved in *Dodez v. United States*, 329 U.S. 338 (1946), are substantially the same. They are identical insofar as the provision for no physical examination upon reporting for civilian work is concerned. The regulations at the time of both cases contemplated a complete and final physical examination long prior to the issuance of the order to report

for civilian work. No remedies of any kind or character remained, therefore, to be exhausted.

This case is entirely different from *Falbo v. United States*, 320 U.S. 549, 552-554 (1944), and is identical to *Dodez v. United States*, 329 U.S. 338, 342-343, 345, 347 (1946), which applied the doctrine of *Estep v. United States*, 327 U.S. 114, 115-116 (1946), but which this Court in *Bjorson v. United States*, 272 F.2d 244 (9th Cir. 1959), cert. denied 362 U.S. 949 (1960), overlooked.

The first question presented here, whether this Court in *Bjorson v. United States*, 272 F.2d 244 (9th Cir. 1959), cert. denied 362 U.S. 949 (1960), erroneously interpreted the regulations so as to require an illegal and vain act that would accomplish nothing in the way of exhausting administrative remedies, is of such great public importance, to require overruling *Bjorson*. There are hundreds of prosecutions under the criminal sanctions clause of the Act throughout the United States involving registrants who have refused to do civilian work and have also refused to report to their local boards or to the hospitals or other civilian work agencies. The Supreme Court in *Dodez v. United States*, 329 U.S. 338, 342-343, 345, 347 (1946), laid down the law of the land which authorizes defenses to be made under the criminal sanctions clause in circumstances identical to the facts in this case. The Court in *Bjorson* (272 F.2d 244 (9th Cir. 1959)) overlooked that in its holding appearing in those parts of the opinion under rubric "4. The Appellant Has Failed to Exhaust His Administrative Remedy: He Must Go to the 'Brink'" and "Conclusions," where the court says: "The appellant has failed to exhaust his administrative remedy."—272 F.2d at pp. 247, 250.

Taking judicial notice of the procedure prescribed by the regulations, the appearance in the Government's Exhibit (Order to Report for Civilian Work) (R. 99) conclusively shows that Daniels had previously submitted himself for a final type armed forces physical examination at the induction station and had been found acceptable by the local board and assigned by the Director for service in a hospital long before he was ordered to do civilian work.

In other words Daniels' status at the time he received the order to report at the local board and proceed to the hospital was exactly the same as the status of Estep at the time he was directed to submit to induction and the same as the status of all registrants at present when they have successfully undergone the armed forces physical examination procedure explained by the Supreme Court in *Estep v. United States*, 327 U.S. 114, 123, 124 (1946), and *Dodez v. United States*, 329 U.S. 338, 342-343, 345-348 (1946).

In *Dodez v. United States*, 329 U.S. 338 (1946), by a construction of the regulations and the Act it was ruled that at this point in the proceedings a registrant, when found physically and mentally fit, was to be deemed acceptable and is accepted. The very next step, the order to do civilian work, was not and is not a part of the selective process. Unmistakably, the court pointed out that in *Billings v. Truesdell*, 321 U.S. 542, 558, 559 (1944), the *Falbo* decision, 320 U.S. 549 (1944), was not to be construed as holding that a man must submit to induction before he could be said to have exhausted his administrative remedies, but that the selective process ended when he was

accepted and that thereafter he could refuse to submit to induction:

“But we can hardly say that he must report to the military in order to exhaust his administrative remedies and then say that if he does so report he may be forcibly inducted against his will. That would indeed make a trap of the Falbo case by subjecting those who reported for completion of the Selective Service process to more severe penalties than those who stayed away in defiance of the board’s order to report.”—*Billings v. Truesdell*, 321 U.S. 542, 558-559.

The foregoing quoted portion of the Billings opinion is a forcible demonstration of this Court’s misapprehension, or overlooking of the regulations governing Bjorson’s acceptance for and assignment to civilian work, and his status at the time he received the order to report for work. He was not indicted for failing to perform any one of the steps in the selective process, but was prosecuted and convicted for not having reported to the board for the sole purpose of going to the hospital. The last step in the selective process had been completed before the order for work had issued. He actually was indicted, prosecuted and convicted for refusal to do work and not for failing to take the last step in the selective process.

Therefore Bjorson’s refusal to go to the board (272 F.2d 244 (9th Cir. 1959), cert. denied 362 U.S. 949 (1960)) is the only assignable reason why the court of appeals ruled that he could not contest the legality of his classification in defense to the indictment. But under the above-quoted portion of the Billings opinion Bjorson did not have to be “actually inducted” or submit to the civilian work

order in order to raise this defense. He did not have to report to the board or to the hospital, be assigned and start to work there any more than did Billings have to take the army oath, be assigned to service in the armed forces and shoulder a gun. When Bjorson was found "physically and mentally qualified for general service" upon his final armed forces physical examination for work of national importance he had been officially and finally accepted, as indicated by the subsequent order to report for work sent by the board. Thus Bjorson exhausted his administrative remedies and under the rules set forth in the *Falbo* opinion itself as amended and clarified by *Billings* and *Dodez* he was then in a position to urge the illegality of his classification as a defense against the indictment.

It can be more readily understood that Bjorson had exhausted his administrative remedies when he successfully completed the final armed forces physical examination, when the rules governing registrants classified I-A, as announced in the *Billings* opinion are contrasted with his situation and that of Daniels here. Billings never received any assignment to an army base because such assignments were not given until after the selectee actually subscribed to the oath at the induction station. But as to conscientious objectors there is no ceremony of subscribing to an oath or other "brink" to mark the beginning of the civilian work process and the end of the selective process. For this reason conscientious objectors receive their assignments to work as a matter of course before order and after they are found to be acceptable. Then later they are merely ordered to report for the purpose of doing the work and not for selection.

The Supreme Court had no difficulty in holding that when Billings had taken the physical examination he had become accepted and had exhausted his administrative remedies, and his refusal to go further did not, under the *Falbo* rule, deprive him of the right to defend his classification in court. That being true in the case of I-A men, the same rule with greater force of reason applies to those classified as conscientious objectors. Assignment of I-O men to do civilian work is analogous to the assignment of an inductee to an army base after actual acceptance for induction.

The only difference is that in the case of I-O men the Selective Service System never loses its jurisdiction over the assignee as it does over every I-A man inducted into the armed forces. But the difference does not affect the analogy.

In both cases the assignment is beyond the mark of the end of the selective process and the administrative remedies and it is not necessary for the registrant to comply with an order to be inducted as a part of the "selective process." The final liability for duty and acceptance is fixed for the conscientious objector when he passes the physical examination, because he is thereupon declared acceptable for duty and service and given an assignment to do civilian work.

The regulations make it plain that *acceptance* of the registrant for work in a hospital as a conscientious objector takes place at the time he is found to be acceptable at the final armed forces physical examination, for if he successfully completes the examination he is thereafter, as a mat-

ter of course, assigned and then sent an order to report to the local board and subsequently to the hospital for work.

The language of the regulations and the practice of the Selective Service System thereunder indicate that the status of the man changes from that of a "registrant" at the time he receives the order from the board to report for transportation to the hospital to that of a "selectee" or "assignee." Under these considerations, it would be contrary to practice and reason to contend that the administrative process of selection had not been completed until he actually reported at the board.

Applying the rules announced in the *Falbo* and *Billings* cases in the light of the plain wording of the regulations above quoted it must be conceded that long before Bjorson and Daniels each received the notice to do work of national importance and at the time they successfully completed the armed forces physical examination, as to them the *selective process* had been completed, the government had made its choice and they had been finally accepted for civilian work.

In the case of each man (Bjorson and Daniels) these facts and his acquired qualification for judicial review certainly were in no way changed by his subsequent refusal to go to the board or go to the hospital and begin actual national service. It is true that he was prosecuted for that refusal, but the whole contention is that his defense pertaining to the illegality of the classification cannot be ruled out on the erroneous assumption that the selective process had not been completed and that he had not exhausted his administrative remedies.

In this case appellant is supported not only by the plain wording of the regulations and by the ruling in the *Billings* case but also by the reasonableness of the proposition. Any other view of the matter would lead to gross injustice and amount to a rule without reason. When a registrant successfully completes his final physical examination, then nothing else remains to be done except ordering him to report for work at the board and hospital at the time and place specified by the Selective Service System.

There are no more hearings, no more appeals, no more physical examinations. Therefore, if a construction and application were placed upon the regulations and the Act requiring the assignee to actually report at the hospital or to the local board to receive transportation to the hospital, as a condition precedent to his attempting to urge the illegality of his classification as a defense to the indictment, then that construction is objectionable on two grounds:

(1) It requires an assignee to do a vain and needless thing before he can avail himself of this admitted defense; and

(2) It makes a trap out of the regulations so as to inflict greater pains and penalties upon a recalcitrant assignee who defies the board by refusing to report and go to the hospital than are allowed by Congress in the Act to be inflicted upon one who goes to the hospital and there defies the agency with his physical refusal to perform work to which he is assigned.

Officials acting for the Selective Service System at hospitals are without authority to change any assignee's classification or of their own motion to provide for another

physical examination. All that the hospital officials can do is put the assignee to work. Obviously this is no administrative remedy and an assignee reporting to the board or to the hospital cannot expect to obtain any relief by going there. The situation is not helped if the selectee merely goes to the local board and refuses to accept transportation to the hospital.⁴

As to Bjorson and Daniels each the administrative process has been completed. Each had been selected, and the only thing required was to go to the board and to the hospital and begin service. To require one to perform this last step of submitting to work as a condition to his urging his defense against the indictment is a requirement without reason, vain and needless, for once he reports to the board or to the hospital as ordered there would be no reason to prosecute him, unless he sneaked out of the hospital by stealth and became a deserter. If he is prosecuted for leaving the hospital, that is another and different charge from the one under consideration. Here we are concerned only with a charge of refusal to report to the board for transportation to the hospital.

A construction of the Act and regulations that would require the assignee to perform the hypocritical act of going to the board merely to refuse to accept transportation to the hospital or to report at the hospital after he had

4. Section 4 (a) of the Act provides that no order shall issue until after physical acceptability has been determined. Congress, therefore, contemplated exhaustion of the administrative remedies before the issuance of the order to do civilian work. (50 U.S.C. App. § 454.) The sections of the regulations prescribing the termination of the physical acceptability prior to the order are as follows: 1628.10, 1628.11, 1628.17, 1628.25, 1650.30. (32 C.F.R. §§ 1628.10, 1628.11, 1628.17, 1628.25, 1650.30.)

been accepted and assigned, in order to exhaust his remedies, is as absurd and immaterial as requiring the selectee to stand on his head or walk a tightrope before he can say that he has exhausted his administrative remedies and qualified himself for judicial review. Repeatedly the Supreme Court has held that it is not necessary to comply with hollow formalisms and futile remedies before it can be said that administrative remedies have been exhausted and judicial review is available. (*Utley v. St. Petersburg*, 292 U.S. 106 (1934); *Delaware & Hudson Co. v. Albany & Susq. R. Co.*, 213 U.S. 435 (1908); see also *N. L. R. B. v. Carlisle Lumber Co.*, 94 F.2d 138; *N. L. R. B. v. Sunshine Mining Co.*, 110 F.2d 780.) This principle was clearly expressed in *Ex parte Cohen*, 254 Fed. 711, a draft case arising during the first world war. There it was said: "It is true that he did not appeal to the district board, as perhaps he should have done, but he ought not to be denied his rights to habeas corpus where his personal liberty and nationality are involved because of his failure to have done a vain thing. The local board for some reason took the matter up with the district board, which board approved the action of the local board, and hence to have appealed to them would have been an act of folly." Denying the defendant here the defense which he sought to urge, and thus making his conviction certain, is just as serious as the reason relied on in the *Cohen* case to make unnecessary the compliance with vain administrative procedure.

Were the Act and regulations construed so as to require a selectee to report to a hospital or to his local board to obtain transportation to the hospital before he could urge

his defense, the requirement would be objectionable because it makes a trap out of the procedure and subjects assignees to greater pains and penalties than those provided for in the Act. Had Daniels gone to his local board and refused to accept transportation to the hospital he might have encountered some serious difficulties with the officials. Had he accepted the transportation and gone on to the hospital, then he would have been required to remain therein until released and could not voluntarily leave. The result in either case would be that he would run the risk of being subjected to additional and greater penalties than those provided in the Act. Besides, there always lurks the ever-present issue of waiver of rights by the one who voluntarily submits to the order.

Under regulations in effect when Daniels was ordered to report for work it seems plain that the possibility of rejection because of a change of physical condition some time between the date of his armed forces physical examination and the time he was scheduled to report at the hospital does not and cannot affect his right to judicial review. If he does not have a change or does not report a change of physical condition there will be no examination and no possibility of being rejected at the hospital.

Judicial review does not hinge on such chimerical uncertainties, especially when it is so plain that the regular administrative process of selection has been completed. It is utterly unreasonable that one, as a condition precedent to judicial review, should be required to appear at a hospital often hundreds if not thousands of miles away when he has previously been finally examined, declared *acceptable* as a

result thereof and ordered to report for civilian work. It is inescapable that the selective process ends when the registrant has been found acceptable after his armed forces physical examination.

Since this is true, then it is likewise true that the remote possibility of a conscientious objector's discharge after arrival at the board or hospital because of a change in physical condition (such as developing a disabling or mortal illness, being in a crippling accident or being otherwise incapacitated) should not cause the court to rule inconsistently that the assignee ordered to submit to work and who refuses for good cause to do so had not exhausted his administrative remedies. The fact is that in the case of the conscientious objector the selective process ended and the administrative remedies had been completely exhausted when he was found acceptable for service at his armed forces physical examination before being ordered to report for civilian work.

As to this error and misapprehension of the effect of the regulations in *Bjorson v. United States*, 272 F.2d 244 (9th Cir. 1959), cert. denied 362 U.S. 949 (1960), the appellant respectfully suggests that "it is never too late to be right." If it is followed here unchallenged by this Court it will work hardship not only on appellant but on thousands of others who now are or will be in a similar position, and in the future upon those who may be caught in similar circumstances under other administrative acts of Congress.

Another reason why it is unjust and unfair to require the appellant to report to the board is because he would be compelled to defend the case at Los Angeles out of the

area where his board is located and where he resided. The irreparable hardship of this rule of law can be demonstrated in places where the states do not use conscientious objectors to do work in state hospitals. In such instances the registrants are ordered frequently to go several hundred or even thousands of miles away from their places of residence and the place where their boards are located to an out-of-state hospital. It is conceivable under the regulations that a registrant could be ordered to do hospital work anywhere in the United States, which would include Hawaii or Alaska.

The injustice of having to be transported from Fresno or some other state or to faraway places for arraignment, bail fixing and prosecution is contrary to the "fair and just" provisions of the Act and irrefutably establishes that it is wholly unreasonable and confiscatory of constitutional rights to force a registrant to report at his local board in order to exhaust his administrative remedies. *Johnston v. United States*, 351 U.S. 215 (1956); compare the dissenting opinion, 351 U.S. at pp. 223-224, for a concise statement of the irreparable hardship that flows from reporting at a local board to receive travel papers to a distant hospital.

The Court should note that the Supreme Court of the United States denied certiorari in *Bjorson v. United States*, 362 U.S. 949 (1960). The denial of certiorari by the Supreme Court in that case does not import the approval of the Court of the holding therein that Bjorson had not exhausted his administrative remedies. There may have been another very good reason for the denial of certiorari. It was apparent that even if certiorari had been granted it

would be necessary to affirm the case on the merits of the claim of Bjorson that he was entitled to a IV-F classification because of his having been previously convicted for violation of the Act.

“The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.” (*United States v. Carver*, 260 U.S. 482, 490 (1923)) It has been commented that notwithstanding this warning lower courts and members of the bar have persisted in giving weight to denial of certiorari. “The danger with which such indulgence in inference is attended would appear to be sufficiently demonstrated by the not inconsiderable number of cases in which the petition for certiorari has been denied on first application, but has been subsequently granted either on petition for rehearing or *sua sponte*, because of an intervening conflict of decision or because subsequent events imported into the case an element of importance it previously did not possess or because an apparent procedural defect had been cured or shown not to exist.”—*Robertson and Kirkham—Jurisdiction of the Supreme Court of the United States*, Wolfson and Kurland, New York, Matthew Bender & Co., 1951 (page 60).

Bjorson v. United States, 272 F.2d 244 (9th Cir. 1959), cert. denied 362 U.S. 949 (1960), should be overruled, because it is contrary to *Dodez v. United States*, 329 U.S. 338, 342-343, 345, 347 (1946), and the “fair and just” provisions of the Act. See 50 U.S.C. § 451(c), which says that the procedure must be “fair and just.” For the same reason Senior-Chief Circuit Judge Parker in *Barnette v. West Virginia State Board of Education*, 47 F. Supp. 251 (S.D. W. Va. 1942), refused to follow the Supreme Court of the

United States in *Gobitis v. Minersville School District*, 310 U.S. 586 (1940), so also this Court should refuse to follow *Bjorson v. United States*, 272 F.2d 244 (9th Cir. 1959), cert. denied 362 U.S. 949 (1960). See the many instances where even lower federal courts have refused to follow the decisions of higher courts in the federal system.—17 Tulane L. Rev. 497 (1943); 22 Oregon L. Rev. 198 (1943).

It is submitted that notwithstanding *Bjorson v. United States*, 272 F.2d 244 (9th Cir. 1959), cert. denied 362 U.S. 949 (1960), this Court should hold that appellant had no further remedies to exhaust and that the doctrine of exhaustion of administrative remedies was satisfied and complied with following the taking of the final armed forces physical examination and the declaration of acceptance by the army.

B

Bjorson Is Distinguishable

During the trial appellant argued that Bjorson was distinguishable from the appellant's case (Rep. Tr. 25). This argument is adopted.

Appellant emphasizes that there is nothing in the Bjorson opinion to indicate that he would have encountered any kind of examination at the Local Board; in any event the record in this case clearly shows appellant would have encountered nothing in the way of a "brink" at his local board (R. 12).

The trial judge commented that appellant might not have been accepted by the Department of Charities. Obviously, appellant's reply to the trial court was not per-

suasive. To the reply appellant then gave he adds the following:

In the case of *U. S. A. v. Dicke*, S. Dist. of Calif. No. 34998, Judge C. Nils Tavares, ruled:

“THE COURT: Taking up, first, the motion of the Government to strike all testimony in behalf of the defendant on the ground that the defendant failed to exhaust his administrative remedies:

“While there are some strong authorities favoring the Government’s contention, particularly in this Circuit, I still feel that later decisions of other Circuit Courts of Appeal and the Supreme Court—and I think one or two even in the Ninth Circuit, by implication—have shown a tendency not to apply literally, in every case, the rule stated in *Falbo v. United States* in 320 U.S. 549, a 1944 decision.

“In this case, the Court feels that the defendant, being a clean, healthy, young man of high principles, and having omitted only the last step of presenting himself to the Los Angeles County Department of Charities, there is no doubt that he would have been accepted for employment had he so presented himself; and therefore, I feel that the contention that he failed to take the last step is somewhat insubstantial in the particular circumstances of this case. I can’t conceive of the Los Angeles Department of Charities turning down a man like this for any kind of work reasonably suited to a healthy, a young man in their Department.

“The motion of the Government is, therefore, denied.”

What was said about defendant Dicke applies equally to appellant Daniels. Each had had a preinduction phys-

ical, each is one of Jehovah's witnesses and each would be considered desirable employees by the Los Angeles Department of Charities.

Compare *Mason v. United States*, 9th Cir., 1955, 218 F.2d 375. In *Mason*, this court considered a parallel of the "brink" problem: *Mason* contended he didn't have to go to the induction station to "exhaust his administrative remedies" because he had had a pre-induction physical examination. This court held that he was required to go there because his pre-induction physical examination was two years before; that he would have been given another physical examination at the time he was ordered to report for induction because of the remoteness of the first one, the current regulations being cited as authority for this statement. Therefore, this court concluded, he might have been rejected at the induction station. In our case, as we have seen from the record, there was no further examination whatever for Daniels to have taken.

II

There Was No Basis in Fact for Denying Appellant's Claim for a Minister's Classification.

The record shows appellant made claim for a minister's classification and presented evidence he was "... a minister" and that he had "... been formally ordained." (Ex. 7)

There was ample corroboration. (Ex. 9, 15-54)

There is nothing in the file that reasonably contradicts his evidence.

Appellant presented a *prima facie* case for a IV-D classification (minister's status). No contrary evidence,

if any existed, was ever placed in the file. Therefore, he should have been classified in Class IV-D. it was incumbent on the board to place adverse evidence in the file, as a justification for rejecting his claim. *Dickinson v. United States*, 74 S. Ct. 152, 159.

Selective Service System regulation, 32 C.F.R., Sec. 1623.2, requires that a registrant be classified in the "lowest" class, according to a table which placed IV-D "lower" than I-O.

1623.2 Consideration of Classes.—Every registrant shall be placed on Class I-A under the provisions of section 1622.10 of this chapter except that when grounds are established to place a registrant in one or more of the classes listed in the following table, the registrant shall be classified in the lowest class for which he is determined to be eligible, with Class I-A-O considered the highest class and Class I-C considered the lowest class according to the following tables:

Class: I-A-O	Class: IV-B
I-O	IV-C
I-S	IV-D
I-Y	IV-F
II-A	IV-A
II-C	V-A
II-S	I-W
I-D	I-C
III-A	

Regulation 32 C.F.R. § 1622.43 governs classification of registrants presenting evidence for a minister's status.

1622.43 Class IV-D: Minister of Religion or Divinity Student.—(a) In Class IV-D shall be placed any registrant:

(1) Who is a regular minister of religion;

(2) Who is a duly ordained minister of religion;

(3) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school; or

(4) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction leading to entrance into a recognized theological or divinity school in which he has been pre-enrolled.

(b) Section 16 of Title I of the Universal Military Training and Service Act, as amended, contains in part the following provisions:

“Sec. 16. When used in this title— * * * (g) (1) the term ‘duly ordained minister of religion’ means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

“(2) The term ‘regular minister of religion’ means one who as his customary vocation preaches and

teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

“(3) The term ‘regular or duly ordained minister of religion’ does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization.”

“Vocation” is the chief consideration. “Full-time” is nowhere mentioned; nor is “part-time” mentioned. Nor is the word “Pioneer” or any equivalent expression used. Neither hours of activity nor clerical title are recognized by the Act or the regulations as factors in classifying.

Ministerial activity that is “irregular” is stated to be a disqualification. This consideration does not apply here. Appellant’s uncontradicted evidence is that he regularly performed enumerated clerical activity.

The only other disqualifying consideration mentioned by law is “incidental”. Here there was no finding by the board on this factor. Appellant’s factual and relevant testimony was to the contrary. None was rebutted. The final step of his processing by the Selective Service System shows that he didn’t regard his ministerial work as

incidental to other work but as something so important to him that he willingly faced a prison term when it became clear that the I-O classification given him would interfere with his obligation to Jehovah.

Thus, there can be no doubt that Appellant Daniels made out a prima facie case, and an un rebutted one.

CONCLUSION

For the reasons above stated, the judgment of the district court should be reversed and an order entered directing the district court to render and enter a judgment of acquittal. In the event this Court finds no basis for acquittal, then the Court should reverse the case and order a new trial because of the errors committed in the ruling on the evidence and the holding that appellant failed to exhaust his administrative remedies.

Respectfully submitted,

J. B. TIETZ,
Attorney for Appellant

JANUARY 6, 1966

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. B. TIETZ,
Attorney for Appellant

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDMUND J. DUNNING,

Plaintiff and
Appellant

vs.

WILLIAM A. HUGGINS, C. J.
GHISELLI, and MICHAEL G. RAFTON,

Defendants and
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DISTRICT

BRIEF FOR APPELLANT

FORREST E. MACOMBER
A. GRANT MACOMBER
ATTORNEYS FOR APPELLANT
416 Bank of America Bldg.
Stockton, California

FILE

OCT 14 1961

FRANK H. SCHMIDT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

-----)
EDMUND J. DUNNING,)
)
Plaintiff and)
Appellant)
)
vs.)
)
WILLIAM A. HUGGINS, C. J.)
GHISELLI, and MICHAEL G. RAFTON,)
)
Defendants and)
Appellees)
-----)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DISTRICT

BRIEF FOR APPELLANT



SUBJECT INDEX

Page

Jurisdiction -- Issue on Appeal	1
Summary of Argument	1
Argument	2
Appendix -- 12 USC Sec. 62	6
Certification	7



TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Bell v. Preferred Life Assur. Soc. 320 U. S. 238, 88 L. ed. 15.	4
Coskery v. Roberts & Mander Corp. 189 F. 2d 234 at 238 (C. A. 3)	5,6
Davenport v. Mutual Benefit Health & Accident Ass'n. 325 F. 2d 785. (C. A. 9)	4
Hurn v. Oursler, 289 U. S. 238	3
J. I. Case Co. v. Borak . 377 U. S. 426, 12 L. ed. 2d 423.	3
1 Moore's Federal Practice 822, Para. 0.90(3) . .	2
1 Moore's Federal Practice, 2d edition, Page 866, Para. .096, Injunctions	6
12 U.S.C.A. Sec. 62 and cases there cited . . .	3,7

JURISDICTION -- ISSUE ON APPEAL

Jurisdiction is conferred upon this Court under the provisions of 12 USC Sec. 62 and 28 USC Par. 1331. The amount in controversy exceeds, exclusive of interest and costs, the sum of \$10,000.00.

The United States District Court dismissed this action for lack of jurisdiction on the ground that the required minimum jurisdictional amount of \$10,000.00 is not present. Plaintiff appeals on the ground that the amount in controversy satisfies the jurisdictional requirement of the United States District Court in that the amount exceeds \$10,000.00.

SUMMARY OF ARGUMENT

Plaintiff brought this action in tort to redress a tortious denial of a Federal right and for conspiracy to do the wrong complained of. The Federal right is the right of a shareholder to have access to a list of the names and residences of all the shareholders. The issue on appeal is whether the amount in controversy meets the \$10,000.00 jurisdictional amount.

I.

The jurisdictional amount in controversy is the amount of damages which Plaintiff in good faith avers is the result of Defendant's tortious denial of Plaintiff's Federal right.

II.

Alternatively, the amount in controversy is the value of the 'federal right.

III.

Also, the amount in controversy is the value of Plaintiff's shares.

ARGUMENT

I.

THE JURISDICTIONAL AMOUNT IN CONTROVERSY IS THE AMOUNT OF DAMAGES WHICH PLAINTIFF IN GOOD FAITH AVERS IS THE RESULT OF DEFENDANTS' TORTIOUS DENIAL OF PLAINTIFF'S FEDERAL RIGHT.

This is an action in tort to redress a wrongful denial of a Federal right and for conspiracy to do the wrong complained of. Plaintiff prays for a remedy in two parts. In the one part, Plaintiff prays for \$25,000.00 general damages and for \$50,000.00 punitive damages. But the wrong is such that money damages alone cannot make the Plaintiff whole. Complete relief can only be given by restoration of the right. So, in the other part, Plaintiff prays for ancillary relief in the form of mandamus to compel compliance with Plaintiff's right and Defendants' duties. See:

1 Moore's Federal Practice 822,
Para. 0.90(3)

As the learned United States District Court noted in the Memorandum of Decision, last paragraph on page 28 of the Transcript of Record, a non-Federal cause of action cannot supply the jurisdictional amount for a Federal cause of action which fails to meet the jurisdictional amount required.

Hurn v. Oursler, 289 U.S. 238. But here the State cause of action for conspiracy is inseparable from the Federal statutory wrong. The tortious denial of the Federal right and the conspiracy to deny the Federal right raise a substantial Federal question because the action is predicated upon a right which did not exist under common law, does not exist under the laws of California, and was created by an Act of Congress. See:

Hurn v. Oursler, supra.

Congress gave to shareholders of national banks the absolute right to inspect a full and correct list of the names and residences of all the shareholders during business hours of each day in which business may be legally transacted. See:

12 U.S.C.A. sec. 62 and cases
there cited.

The Plaintiff is a shareholder of the Central Valley National Bank whose right under 12 U.S.C.A. sec. 62 was invaded pursuant to a conspiracy to invade his Federal right. Thus, the extent and nature of the legal consequences of the wrongful denial of Plaintiff's right, though left by the statute to judicial determination, are nevertheless Federal questions. See:

J. I. Case Co. v. Borak
377 U.S. 426, 12 L. ed. 2d 423.



Therefore, the only question is whether the amount in controversy under the wrongful denial of the Plaintiff's right exceeds \$10,000.00. Plaintiff in good faith alleges money damages far in excess of the \$10,000.00 jurisdictional amount. The amount claimed is not unreasonable under the facts alleged. And, though upon a determination on the merits of the case the Plaintiff may be awarded less than \$10,000.00, it does not appear to a legal certainty that the Plaintiff could not recover more than \$10,000.00. See:

Bell v. Preferred Life Assur. Soc.
320 U. S. 238, 88 L. ed.15.

Davenport v. Mutual Benefit Health
& Accident Ass'n. 325 F. 2d 785.
(C. A. 9)

II.

ALTERNATIVELY, THE AMOUNT IN CONTROVERSY IS THE VALUE OF THE FEDERAL RIGHT.

The Plaintiff contends that the amount in controversy is his damage arising out of the tortious denial of his Federal right. But if the Court determines that the amount in controversy is the value of the right itself, rather than the injury arising out of the tortious denial of the right, then the jurisdictional amount is found in the value of all the assets of the Central Valley National Bank or in the Bank's net worth as that reflects the value of the ownership of the Bank. This is because the ability to communicate with the shareholders is critical to control of the corporation.

Control of the corporation brings the entire value of the corporate assets into controversy in an analogous situation: Receivership. See:

Coskery v. Roberts & Mander Corp.
189 F. 2d 234 at 238 (C. A. 3)

No doubt the Defendants will cite other analogous situations to sustain their contention that the right of access to the list of shareholders has no substantial monetary value: The right to inspect the books and records of a corporation and a shareholder's pre-emptive right. But none of these analogies, including our analogy to receivership, are directly in point. Therefore, which analogy is really pertinent? We submit that receivership is the pertinent analogy because it deals directly with placing control in the hands of another. The pre-emptive right analogy runs second because it deals with maintaining the status quo of ownership and control rather than with who shall gain control. And the analogy to the right to inspect the books and records of a corporation runs a poor third because it preserves the owner's right to audit the acts of management rather than to gain control of the corporation.

In this case the relief asked for directly affects the right to the control of the corporation because those who control a corporation affect its management to such an extent that they determine the effectiveness of its management and so determine the value of the corporation. The "wrong" management of the corporation, and this one has total assets in



excess of \$185,000,000.00, could easily reduce the total assets by \$10,000,000.00, not to mention .1% of that sum. Accordingly, the amount in controversy is the entire value of the corporate assets, on the theory that the relief or control asked for affects the entire value of the corporation.

III.

ALSO, THE AMOUNT IN CONTROVERSY IS THE VALUE OF PLAINTIFF'S SHARES.

Where the Plaintiff asks for injunctive relief in the form of mandamus, though ancillary to the causes of action in tort, the amount in controversy is also the value of Plaintiff's property because mandamus would protect the value of Plaintiff's shares. See:

1 Moore's Federal Practice, 2d Edition,
Page 866, Para. .096, Injunctions

See, also:

Coskery v. Roberts & Mander Corp.,
Supra.



APPENDIX
12 USC Sec. 62

The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under State authority, during business hours of each day in which business may be legally transacted. A copy of such list, on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted to the Comptroller of the Currency. RS. § 5210.



CERTIFICATION

I certify that, in connection with the preparation of this Brief, I have examined rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those requirements.

A. Grant Macomber
A. GRANT MACOMBER

CERTIFICATE OF SERVICE BY MAIL

I, A. GRANT MACOMBER, certify that I am one of the Attorneys for Plaintiff and Appellant in this action, and that I served three copies of the above Brief for Appellant by mail on Lempres and Seyranian, Attorneys for Appellee, Michael G. Rafton, and three copies of the Brief for Appellant by mail on Fitzsimmons and Petris, Attorneys for Appellees, Huggins and Ghiselli, on October 14, 1965.

A. Grant Macomber
A. GRANT MACOMBER

No. 20310

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDMUND J. DUNNING,)
)
Plaintiff and)
Appellant)
)
vs.)
)
WILLIAM A. HUGGINS, G. J.)
GHISELLI, and MICHAEL G. RAFTON,)
)
Defendants and)
Appellees)
_____)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

APPELLANT'S REPLY BRIEF

FORREST E. MACOMBER
A. GRANT MACOMBER
ATTORNEYS FOR APPELLANT
416 Bank of America Bldg.
Stockton, California

FILED

DEC 6 1965

FRANK H. SCHMID, CLERK

No. 20310

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDMUND J. DUNNING,)
)
Plaintiff and)
Appellant)
)
vs.)
)
WILLIAM A. HUGGINS, G. J.)
GHISELLI, and MICHAEL G. RAFTON,)
)
Defendants and)
Appellees)
_____)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

APPELLANT'S REPLY BRIEF

SUBJECT INDEX

	<u>Page</u>
Jurisdiction -- Issue on Appeal	1
Summary of Argument	1
Argument	2
Appendix	6
Certification	7

TABLE OF AUTHORITIES

Article

Page

A Federal Judge Looks at His Jurisdiction, by the Honorable Talbot Smith, American Bar Association Journal, November, 1965, Vol. 51, No. 11	4
-------------------------------------------------------------------------------------------------------------------------------------------------------------------	---

Statutes

12 U.S.C.A.	5
---------------------	---

Case

M'Culloch v. Maryland, 4 Wheat. (U.S.) 316, 4 L.Ed. 579	5
----------------------------------------------------------------------	---



JURISDICTION -- ISSUE ON APPEAL

Jurisdiction is conferred upon this Court under the provisions of 12 USC Sec. 62 and 28 USC Par. 1331. The amount in controversy exceeds, exclusive of interest and costs, the sum of \$10,000.00.

The United States District Court dismissed this action for lack of jurisdiction on the ground that the required minimum jurisdictional amount of \$10,000.00 is not present. Plaintiff appeals on the ground that the amount in controversy satisfies the jurisdictional requirement of the United States District Court in that the amount exceeds \$10,000.00.

SUMMARY OF ARGUMENT

I.

This controversy is not moot because there are substantial ends to be served if the Plaintiff is allowed to prosecute this action.

II.

The reason for the rule that the jurisdictional amount in controversy is the amount of damages which Plaintiff, in good faith, avers, is the result of Defendants' tortious denial of Plaintiff's Federal right.

ARGUMENT

I.

THIS CONTROVERSY IS NOT MOOT BECAUSE THERE ARE SUBSTANTIAL ENDS TO BE SERVED IF THE PLAINTIFF IS ALLOWED TO PROSECUTE THIS ACTION.

In March, 1965, EDMUND J. DUNNING and another Voting Trustee of Central Valley National Bank stock, sought¹ to stop MICHAEL G. RAFTON from fulfilling his avowed intent to run the Central Valley National Bank for the benefit of MICHAEL G. RAFTON. Beginning with a suit to determine whether the Voting Trustees had the power to amend the Voting Trust in contravention of its express terms¹, six (6) more suits were filed² in moves and counter-moves for the control of the Central Valley National Bank.

Before that first suit was filed, MICHAEL G. RAFTON had organized others to "raid" the Bank: The first move, as his actions affect this litigation, was to secure an amendment of the Voting Trust to permit easier termination of it. That amendment is the subject of the first action in this series of litigation.

RAFTON'S "raiders" are now in control of the Bank. But in order to retain control, they must "break" the Voting Trust. Whether the Voting Trust will be broken, and, the ultimate question, who will run the Central Valley National Bank for whose benefit, will be up to the beneficial shareholders in the end. Therefore, communication with the

1. See Appendix

2. See Appendix



shareholders is essential for both sides.

Here the Plaintiff complains of the tactics of RAFTON'S "raiders" in securing exclusive control of the shareholder list which is critical to communication with the shareholders. If either side is prevented from communicating with the shareholders, there is a failure of information and a denial of the shareholders' free choice on the basis of merit.

Therefore it is essential that the Plaintiff continue to have access to the list of shareholders. For now, the Plaintiff has access. It was secured in lieu of appointment of a receiver in Dunning vs. Edger, where the Plaintiff complained that the Defendants, WILLIAM A. HUGGINS and G. J. GHISELLI, et al, were soliciting and exchanging Voting Trust certificates for common stock after G. J. GHISELLI had unilaterally declared the Voting Trust terminated. But we do not know how long the Plaintiff will have access to the list of shareholders.

Indeed, it appears that access is not doing as much good as was hoped: MICHAEL G. RAFTON, WILLIAM A. HUGGINS and others have since solicited proxies of the shareholders in violation of the Securities Exchange Act, §12g (1964). (That was the basis for Dunning, et al vs. Rafton, et al²). Because of the continuing iniquitous acts of RAFTON'S "ring" the Plaintiff can only hope to deter the Defendants by making them pay for each of their unlawful acts; so this controversy is not moot. If the Plaintiff can enforce his Federal rights

2. See Appendix

in the United States Courts then perhaps the Defendants will not so readily abuse his rights.

II.

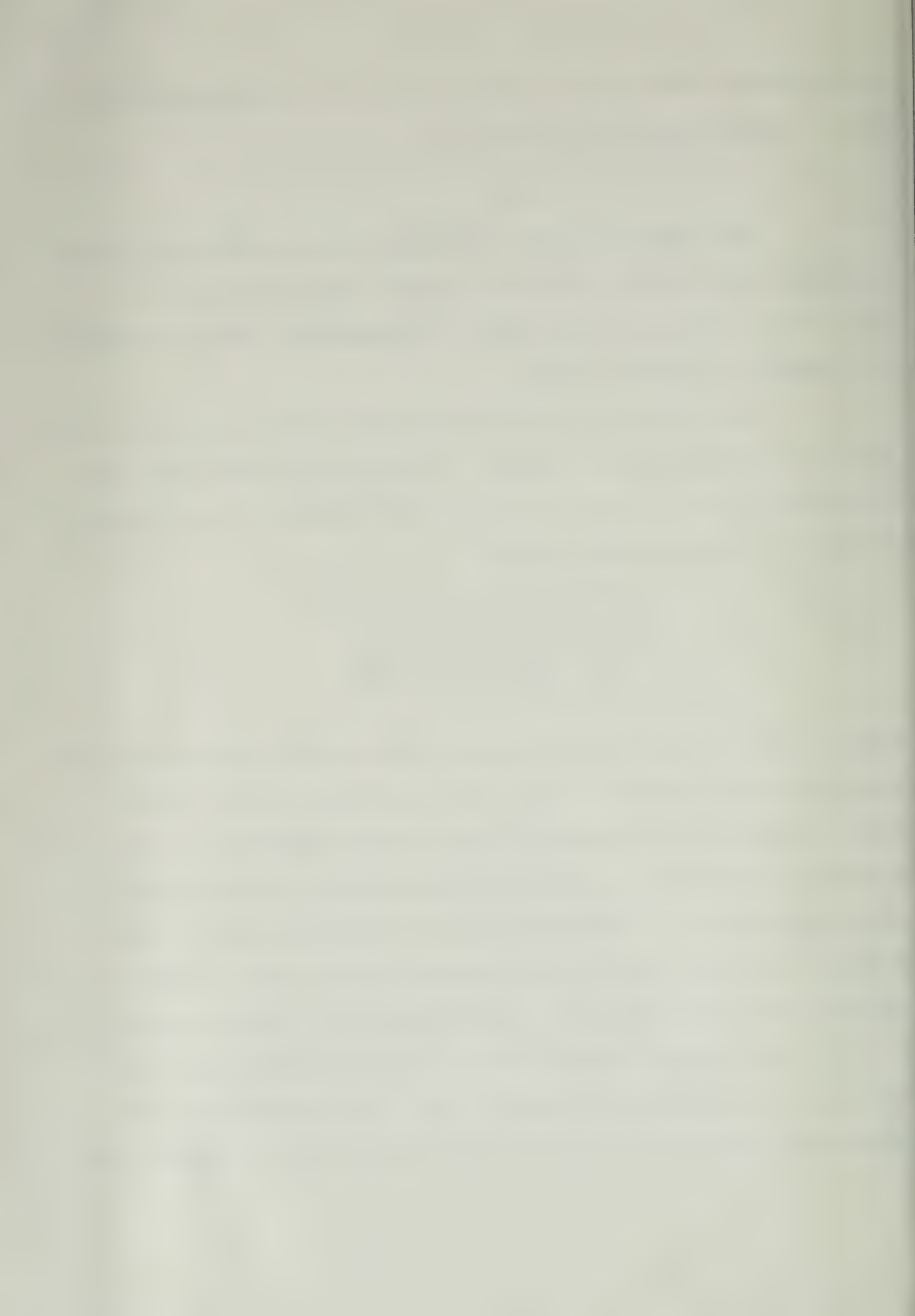
THE REASON FOR THE RULE THAT THE JURISDICTIONAL AMOUNT IN CONTROVERSY IS THE AMOUNT OF DAMAGES WHICH PLAINTIFF, IN GOOD FAITH, AVERS, IS THE RESULT OF DEFENDANTS' TORTIOUS DENIAL OF PLAINTIFF'S FEDERAL RIGHT.

The dignity of the United States Courts should be lent only to controversies of import. "There is no doubt that the Congressional policy is to prevent the clogging of the Federal dockets by unsubstantial claims."

A Federal Judge Looks at
His Jurisdiction, by the
Honorable Talbot Smith,
American Bar Association
Journal, November, 1965,
Vol. 51, No. 11

The Honorable Talbot Smith stresses that trivial cases should not take the Federal court's time. In the article cited, Judge Smith shows the development of the liberal treatment of the monetary requirement for Federal jurisdiction. His point is that the purpose of liberalizing the requirement was to admit Federal cases of import to the Federal courts, not to admit trivial cases just because a lawyer plays the "numbers game".

We ask the United States Court of Appeals to regard this as a controversy of import: Here is a corporation with staggering economic power. It is a corporation which exists by



virtue of an Act of Congress (12 U.S.C.A.); it is answerable to the United States Government (12 U.S.C.A.); its effect on the monetary system is a matter of national interest (M'Culloch v. Maryland 4 Wheat. [U.S.] 316, 4 L.Ed. 579). The evident necessity for fair play and full disclosure in soliciting the shareholders' support, and the public interest in who shall run the Central Valley National Bank make this a controversy of import. Therefore, the reason for the rule applies. And where the reason applies, so should the rule apply: The jurisdictional amount in controversy is the amount of damages which Plaintiff, in good faith, avers, is the result of Defendants' tortious denial of Plaintiff's Federal right.

DATED: December 3, 1965

Respectfully submitted,

A. GRANT MACOMBER
FORREST E. MACOMBER

By *A. Grant Macomber*
A. GRANT MACOMBER

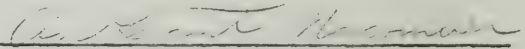
ATTORNEYS FOR APPELLANT

APPENDIX

1. Dunning, et al, vs. Partridge, et al. Superior Court of the State of California, County of Alameda, No. 349045
2. Dunning, et al, vs. Rafton, et al. United States District Court, Northern District, Southern Division, No. 44216
2. Barboni, et al, vs. Partridge, et al. Superior Court of the State of California, County of Alameda, No. 351518
2. Huggins, et al, vs. Domich, et al. Superior Court of the State of California, County of Alameda, No. 351379
2. Central Valley National Bank, et al, vs. Wahyou, et al. United States District Court, Northern District, Southern Division, No. 43806
2. Dunning vs. Huggins, et al. The case at bar
2. Dunning, et al, vs. Edger, et al. Superior Court of the State of California, County of Alameda, No. 350641

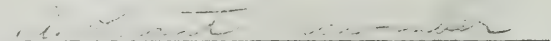
CERTIFICATION

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those requirements.


A. GRANT MACOMBER

CERTIFICATE OF SERVICE BY MAIL

I, A. GRANT MACOMBER, certify that I am one of the Attorneys for Plaintiff and Appellant in this action, and that I served three copies of the above Appellant's Reply Brief by mail on Lempres and Seyranian, Attorneys for Appellee, MICHAEL G. RAFTON, and three copies of the Appellant's Reply Brief by mail on Fitzsimmons and Petris, Attorneys for Appellees, HUGGINS and GHISELLI, on December 3, 1965.


A. GRANT MACOMBER

No. 20309

IN THE
United States Court of Appeals
For the Ninth Circuit

OLA HENDRICKS and JANE DOE HENDRICKS, his wife, and
HORLEIF PETERSEN and JANE DOE PETERSEN, his wife,
Appellants,

v.

OLAF ONA,
Appellee.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT OF THE WESTERN DISTRICT OF
WASHINGTON

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

LEVINSON & FRIEDMAN
RONALD J. BLAND
Proctors for Libelant

Office and Post Office Address:
602 Northern Life Tower
Seattle, Washington 98101

SUBJECT INDEX

	<i>Page</i>
Argument in Support of Judgment.....	1
Introduction	1
The Contract	3
The Breach of Contract (Inadequacy of Notice).....	3
Measure of Damages.....	11
Conclusion	17
Certificate	19

TABLE OF CASES

<i>Carroll v. United States</i> , 133 F (2d) 690 (2 Cir. 1943)	2
<i>Cunningham v. Rederiet Vindeggen</i> , 333 F. (2d) 308 (CCA 2, 1964).....	2
<i>Grantham v. Quinn</i> , 344 F. (2d) 590 (CCA 4).....	1
<i>Harden v. Gordon</i> (1823, 2 Mass. 541).....	11
<i>Joncich v. Vitco</i> , 234 F. (2d) 161 (CCA 9, 1956).....	16
<i>Lukmanis v. United States</i> , 208 F. (2d) 260 (2 Cir. 1953)	2
<i>McAllister v. United States</i> , 348 U. S. 19, 75 S. Ct. 6, 99 L.Ed. 3.....	1
<i>Palmeiro v. Spada Distributing Co.</i> , 217 F. (2d) 561 (CCA 9, 1954)	10-11
<i>Putnam and Overman v. Lower, et al</i> , 236 F. (2d) 561, (CCA 9)	11
<i>U. S. v. SS Soya</i> , 330 F. (2d) 732, 735 (CCA 4, 1964) ..	1-2
<i>Vitco v. Joncich</i> , 130 F. Supp. 945 (S.D. Cal 1955).....	16
<i>Wells v. Alexandre</i> , 130 N.Y. 642, 29 N. E. 142 (1891) ..	5

TEXTBOOKS

17A CJS "Contracts" §504 (1) (d) p. 795.....	5
17 Am.Jur. (2d) "Contracts" §256, p. 653-654.....	4
17 Am.Jur. (2d) "Contracts" §448, p. 912	10
17 Am.Jur. (2d) "Contracts" §450, p. 914.....	10, 11

IN THE
United States Court of Appeals
For the Ninth Circuit

OLA HENDRICKS and JANE DOE HENDRICKS,
his wife, and

THORLEIF PETERSEN and JANE DOE PETERSEN,
his wife,

Appellants, } No. 20309

v.

OLAF ONA,

Appellee. }

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT OF THE WESTERN DISTRICT OF
WASHINGTON

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

ARGUMENT IN SUPPORT OF JUDGMENT*
INTRODUCTION

Appellants acknowledge at page 15 of their brief, appeals in admiralty are not trials *de novo* and that District Court findings are binding unless clearly erroneous. *McAllister v. United States*, 348 U.S. 19, 75 S. Ct. 6, 99 L.Ed. 3; *Grantham v. Quinn*, 344 F.(2d) 590 (CCA 4); *U.S. v.*

**Guide to Terminology and Abbreviations Used in this Brief.* The abbreviation "R" is used to designate the page of the record of the pleadings, motions, judgment and similar documents. The abbreviation "Tr" is used to designate the page of the testimony and trial proceedings.

SS *Soya*, 330 F. (2d) 732, 735 (CCA 4, 1964). Furthermore as stated in *Cunningham v. Rederiet Vindeggen*, 333 F.(2d) 308 (CCA 2, 1964),

“ . . . it is clear that *a trial court's findings as to damages are to be accorded just as much weight on review as other findings of fact*, e.g., *Lukmanis v. United States*, 208 F.(2d) 260 (2 Cir. 1953) (*per curiam*); *Carroll v. United States*, 133 F(2d) 690 (2 Cir. 1943); and, in suits in admiralty as well as in other cases, a reviewing court may not overturn a lower court's findings of fact unless the reviewing court is convinced that the finding is ‘clearly erroneous’.”

It is libelant's contention that the record in this case bears out the following:

1. There was an oral contract of employment between the parties whereby libelant was to join the crew of the FV “SEA STAR” as a crab fisherman in August, 1963, and was to be compensated on a share of the catch basis.

2. It was implicit that libelant was to be given reasonable notice by appellants as to when and where he was to join the vessel.

3. That libelant was given improper and untimely notice and that this constituted a wrongful repudiation of the contract.

4. That appellants wrongly hired another man, Arne Haugen, to replace him.

5. That but for appellant's wrongful repudiation of the contract in August, 1963, libelant would have earned at least as much as did his replacement during the period

from August, 1963, through March, 1964.

All of the above contentions were adopted in substance by the trial court in its Findings of Fact.

THE CONTRACT

Findings of Fact IV and V set out the essential terms of the contract between the parties. Appellant makes no specification of error regarding either finding. The findings are as follows:

“IV

“That in the month of June, 1963, respondents entered into an oral contract of employment with libelant under the terms of which libelant was employed as a seaman and fisherman in the crew of the FV “SEA STAR” for the coming crab fishing season to commence shortly thereafter.” (R.33)

“V

“That under the terms of said contract, libelant was to join said vessel in Alaskan waters in August, 1963, and libelant was to receive as compensation for his services a full share of the proceeds of the catch of said vessel in accordance with the custom and practice in the crab fishing industry.” (R.33)

THE BREACH OF CONTRACT (INADEQUACY OF NOTICE)

Finding of Fact No. IX to which no specification of error is made states:

“That on August 10, 1963 (Saturday), respondent, Thorleif Petersen notified libelant by phone that he was expected to join the FV “SEA STAR” on Kodiak Island, Alaska, on the following Monday, two days later.” (R.34)

It was this notification which the court in Finding No. X held to be "improper, untimely and unreasonably short under the circumstances". (R.34)

Appellants admit at page 6 of their brief that "in fact, there was no flight (from Seattle) by which a man could arrive in Kodiak on Monday . . ." and yet, notwithstanding this, they contend that the court erred in finding this notice to be improper and unreasonable.

The general law applicable to this question of what is fair and reasonable and what obligations are owed by the parties is set forth in 17 Am.Jur.(2d) "Contracts" § 256, pages 653-654:

"Every contract implies good faith and fair dealing between the parties to it, and a duty of cooperation on the part of both parties. Accordingly, whenever the cooperation of the promisee is necessary for the performance of the promise, there is a condition implied that the cooperation will be given. Indeed, it may be said that contracts impose on the parties thereto a duty to do everything necessary to carry them out. When one undertakes to accomplish a certain result he agrees by implication to do everything to accomplish the result intended by the parties. If the giving of notice is requisite to the proper execution of a contract, a promise to give such notice will be inferred. Moreover there is an implied undertaking in every contract on the part of each party that he will not intentionally and purposely do anything to prevent the other party from carrying out his part of the agreement, or do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. Ordinarily if one exacts a promise from another to perform an act, the law implies a counter promise against arbitrary and

unreasonable conduct on the part of the promisee.”
(Emphasis added)

As stated in *Wells v. Alexandre*, 130 N.Y. 642, 29 N.E. 142 (1891),

“ . . . If a notice was requisite to its (the contract’s) proper execution, a covenant to give such notice will be inferred, for any other construction would make the contract unreasonable and place one of the parties entirely at the mercy of the other.”

Further, as stated at 17A CJS ‘Contracts’ § 504 (1) (d) at page 795,

“Although time is not made of the essence of a contract by express stipulation, the party to whom performance is due may make it essential by giving notice to perform . . . but such notice must allow a reasonable time to the other party to perform.”

Not only was the date given an impossible one to meet, but the means by which it was transmitted was manifestly unsatisfactory since appellant Hendricks admitted he could have sent a telegram or wire or could have telephoned appellee directly, but that instead he sent a letter which took at least an additional two days and perhaps more.

On this point appellant Hendricks testified as follows:

Q. “You could have sent him a telegram or a night letter or a wire?”

A. “I could have.” (Tr. 53)

Q. “When did Dennis send the letter?”

A. “I imagine it would have been a day or two before, because it is airmail.”

Q. "If you wanted to call somebody on the telephone from where you were, in Moser Bay, you could do it?"

A. "Yes, I could." (Tr. 54-55)

Q. "You could send a telegram, also?"

A. "Yes, I could." (Tr. 55)

Q. "Now, but for the fact according to your testimony that Mr. Ona couldn't join the vessel on two days' notice, Saturday when he got the notice until Monday, he would have had his chance on the "SEA STAR" if he was available, is that correct?"

A. "I so stated, if he was available." (Tr. 57)

On this same point, witness, Dennis Petersen, appellant Petersen's son, testified as follows:

Q. "Incidentally, when you were in the cannery, where you described this microphone arrangement, and the loud speakers, or whatever . . . was there any problem of hearing, any problem of communicating back and forth?"

A. "There was a little static, but other than that, there wasn't any problem.

Q. "You could hear what was on the other end, is that correct?"

A. "Yes.

Q. "You could make yourself understood at the other end?"

A. "Yes.

Q. "So, in other words, there was instantaneous communication facilities available between Seattle and Moser Bay?"

A. "By radio phone you mean?"

Q. "Yes.

- A. "Yes, it took us an hour to get from the boat down to the cannery." (Tr. 268-269)

It is admitted that libelant's replacement, Arne Haugen, joined the vessel on Tuesday, August 13, and according to witness, Dennis Petersen, the letter to Thorleif Petersen in Seattle directing Petersen to advise Ona of the crucial date was sent approximately one week prior to that date. (Tr. 269-270) Thus instead of a 48 hour notice, libelant could have been given seven days notice.

As to the custom of the fishing industry regarding notice, witness Peter Myhre testified as follows:

- Q. "Isn't it also the custom in the fishing industry, Mr. Myhre, to try to give a crew member or someone who is going to join the vessel, as much notice as you possibly can?"

- A. "That is right."

- Q. "So, in this case, they could have given Mr. Ona at least two more days notice by simply sending a telegram or a wire; isn't that right?"

- A. "That is right." (Tr. 250)

Witness Dennis Petersen's testimony regarding the appropriateness of the means chosen to notify appellee is also pertinent:

- Q. "Is it fair to say, Mr. Petersen, if you want to get an important message to Seattle quickly, you get on the telephone at Moser Bay and call Seattle?"

- A. "Yes."

- Q. "Certainly, if you wanted to get an important message to Seattle, and time was important, this is what you would do; isn't that correct?"

A. "It depends on how important it was.

Q. "Well certainly, if it concerned—if time was of the essence, and it concerned many thousands of dollars you would do it, wouldn't you?"

A. "Yes, definitely." (Tr. 273-274)

In short, there is abundant evidence in the record to support the inescapable conclusion that the means of communicating this crucial notice was, to say the least, impractical and that the specifications contained in the notice were impossible to meet.

It is also interesting to note what transpired on Saturday, August 10, 1963. After appellant, Thorleif Petersen, received the letter from Alaska, he called Mr. Ona on Saturday morning between 9:30 and 10:00 o'clock. Thorleif Petersen testified concerning the phone conversation with libelant on Saturday as follows: (Tr. 325).

Q. "And you told him to take the next flight to Kodiak?"

A. "I didn't say that.

Q. "What did you tell him?"

A. "I told him to be there on Monday." (Tr. 326)

Q. "And he, according to your testimony, he told you that he couldn't leave before the latter part of the week, Wednesday or Thursday; isn't that what he said?"

A. "That is correct.

Q. "And then you told him that you would think it over, and call him back?"

A. "That's right, because--" (Tr. 326)

Q. "That was all you told him, isn't it?"

A. "Right." (Tr. 327-328)

Q. "But you testified, did you not, that you called Mrs. Ona later in the afternoon, didn't you?"

A. "I called her around 6:00 o'clock.

Q. "And you told him the deal—and you told her that the deal was off?"

A. "That is correct, because—" (Tr. 328)

Q. "So then, in effect, Mr. Petersen, you cancelled Mr. Ona's chance on the "SEA STAR" before you ever told him about Mr. Haugen, or the possibility that you might have another man?"

A. "That is correct.

Q. "By 6:00 o'clock that evening his chance was gone, right?"

A. "That is correct." (Tr. 330-331)

Q. "... I asked you, yes or no, did you tell him, on Saturday, in your conversation with him that you were considering another man?"

A. "No, I don't see where it is any of his business." (Tr. 332)

Q. "And you never called Mr. Ona back and said, well, it would be all right if you took the direct flight on Tuesday, did you?"

A. "No, I did not.

Q. "You told him it was Monday or nothing, right?"

A. "That is right." (Tr. 334)

The above testimony certainly reveals an absence of the requisite "fair dealing", if not "good faith".

As to appellant's contention that libellant's statement on Saturday, August 10, (which is disputed by libellant him-

self) that he could not join the vessel until "later in the week" constituted an anticipatory breach of the contract between the parties, this position is unsupportable based either on the facts of the case or the applicable law. According to 17 Am.Jur.(2d) "Contracts" §448 at page 912,

"An anticipatory breach of contract is not established by a negative attitude or one which indicates more negotiations are sought or that the party may finally perform."

See also 17 Am.Jur.(2d) "Contracts" § 450 at page 914,

"In order to justify the adverse party in treating the renunciation as a total breach, the refusal to perform must be of the whole contract or of a promise or obligation going to the whole consideration, and it must be distinct, unequivocal and absolute."

As indicated *supra*, when informed that libelant couldn't leave before the latter part of the week (Wednesday or Thursday), respondent Petersen simply told libelant that he would "think it over, and call him back" which according to his own admission, he never did. (Tr. 334)

Further, according to 17 Am.Jur.(2d) "Contracts" § 450 at page 914,

"To constitute an anticipatory breach based on a request for a modification of terms, such request must be coupled with an absolute refusal to perform unless the request is granted."

Accordingly, in *Palmeiro v. Spada Distributing Co.*, 217 F.(2d) 561 (CCA 9, 1954), a potato dealer brought suit on an alleged oral contract with a farmer. The court succinctly held that,

“ . . . The question of breach of any contract, oral or written, is a question of fact to be left to the trier of fact . . . ”

The court in *Palmeiro* also observed that,

“An anticipatory breach of contract is not established by a negative attitude or one which indicates more negotiations are sought or that the party may finally perform.”

To summarize, even if appellant Petersen's version of the Saturday morning conversation with libelant is accepted, libelant's statement can hardly be classified as the “distinct, unequivocal, and absolute” refusal to perform required under the law. 17 Am.Jur.(2d) “Contracts” § 450 at page 914. In this case, it was appellants' untimely, unreasonable and improper notice that constituted the renunciation or breach of the contract between the parties.

MEASURE OF DAMAGES

In *Putnam and Overman v. Lower, et al*, 236 F.(2d) 561, (CCA 9), the court discussed the general maritime law applicable to the fishing lay or share in earnings agreement, in the following terms:

“That the initial exercise of power therein was maritime is clear, since the cause originated as a libel for wages and damages resulting from wrongful action relating to a fishing lay. Ever since the opinion of Justice Storey in *Harden v. Gordon* (1823, 2 Mass. 541), it has been settled in the maritime law of the United States that seamen are the wards of Admiralty and as such the courts of admiralty vigilantly guard against any encroachment upon their rights. The jurisdiction

of the courts of admiralty over the wage claims of seamen is anciently established. From the dawn of maritime commerce, the necessity for skilled and courageous mariners has been recognized and the law jealously protected them as to certain and prompt payment of wages or compensation by other methods. Originally, seamen were compensated by a stake or share of the profits of the voyage. More recently, it has become customary to pay fixed wages, but the old form survives in the lay plan employed in the more speculative pursuits of sealing, whaling and fishing. Fishermen, although possessing wages and customs peculiar to their business, are nonetheless seamen, and in general receive the same protection."

The voyage in the *Putnam* case was never completed, therefore, lost profits could not be measured, but the court did state:

" . . . The gauge of damages for breach of nearly all commercial contracts is the value of the future profits encompassed by the contract, nevertheless such profits must be determined with reference to some substantial criterion, without which any award would be merely speculative . . . *Prospective profits are generally allowed* only where there is an established going business or *where the job contracted for was subsequently completed by another, thereby realizing the profits . . .*" (Emphasis added)

Here the employment opportunity which was wrongfully denied to libellant was fulfilled by another (Haugen) and Haugen's earnings provide us with a liquidated measure of damages.

The questions of how long libellant would have remained in the service of the vessel but for the breach of contract and how much he would have earned are questions of fact.

The court based its findings and conclusions regarding this point on an abundance of testimony and evidence largely offered by appellants themselves. It goes almost without saying that unless appellants thought Mr. Ona capable of satisfactory performance in the crew of the FV "SEA STAR", they would not have made arrangements to hire him, and yet they now seem to contend that libelant was either too old or too sick to do the job. If they didn't think he could do the job, why did they hire him in the first place?

Appellants in their brief at page 33 acknowledge that hypothetical questions were placed by libelant's counsel to appellants and several other witnesses and that all testified that appellee would probably have remained on the vessel through the Spring season of 1964 if his work was satisfactory (Tr. 23, 24, 42, 43, 189, 208, 254 and 255).

Libelant's Exhibit No. 2, a signed statement of witness, Peter Myhre, another crew member of the FV "SEA STAR", admitted without objection, (Tr. 246) states in part that,

"Most likely when a crew member gets a chance on a crab boat, he stays on the vessel until the end of the Spring season, unless the fisherman quits or can't get along with the Skipper . . . Presumably had Ona joined the vessel, he would have stayed on until April, 1964."

Libelant's replacement, Arne Haugen, testified as follows:

Q. "And did all the crew members who wanted to stay

on rejoin the vessel after New Years?

A. "Yes.

Q. "And they continued to crab fish until the following April, is that right, on the vessel, when the vessel returned to Seattle?"

A. "Yes." (Tr. 203)

Q. "So, your total earnings on the "SEA STAR", in the Fall season of 1963, and the Spring season of 1964, which approximates \$10,744.61 in the Fall, and about \$4,500.00 more in the Spring would have been even greater had you stayed on past November 18, and not taken some time off; and furthermore, had you not been injured and missed out on the last six weeks of the season, isn't that correct?"

A. "That is right.

Q. "So, then, if Mr. Ona had your job, isn't it fair to say that he would have earned at least as much as you did?"

A. "Yes.

Q. "Is that correct?"

A. "That's correct." (Tr. 204)

Q. "Now, let me ask you, what we lawyers call a hypothetical question which assumes certain facts. Now, I want to ask you this: Assuming that Mr. Ona had joined the vessel, in August, 1963, do you see any reason why he wouldn't have stayed on until the end of the season, in April of 1964?"

A. "Well, if he qualified, he would have stayed on, I guess.

Q. "If he joined the vessel, he would have earned at least as much as you did?"

A. "Yes." (Tr. 208)

On this point witness Ness testified to the same effect:

Q. "Normally speaking, Mr. Ness, doesn't the same crew member who was on the vessel in the Fall season continue on into the Spring season, assuming (1) he wants to, and (2) he is doing a reasonably good job?"

A. "Yes I suppose he is on." (Tr. 183)

Thorleif Petersen himself admitted that the crab fishermen hired in the spring to commence fishing in the summer, usually continue in the service of the vessel through the following spring when he testified as follows:

Q. But, assuming that the crew member is hired on the vessel in April, or May and starts in July, if he wants to stay in, assuming he does a reasonably good job, and he is a reasonably good fisherman, he would stay on the vessel, if he wanted to, at least, until the following April; is that right?

A. "—"

Q. "As a general rule?"

A. "As a general rule, yes." (Tr. 23-24)

Furthermore, there is a dearth of evidence to indicate that Mr. Ona would not have been able to satisfactorily perform the job of a crab fisherman. The following excerpt from the testimony of witness Ness (with the question posed by appellants' own counsel) indicates how appellants attempted and failed to create this impression:

Q. "Based on the observations you have made of Mr. Ona's work on the pots and your knowledge of the operations, do you have an opinion as to whether or not you would have retained him as a member of the crew?"

A. "No, I got no opinion . . ." (Tr. 168)

Not only does the testimony in the record fail to bear out appellants' contentions regarding the evidence on damages, the cases which they cite fail to support their legal conclusions in this regard. Appellants in their brief have discussed the case of *Vitco v. Joncich*, 130 F.Supp. 945 (S.D. Cal. 1955), Aff'd by Per Curiam opinion in *Joncich v. Vitco*, 234 F.(2d) 161 (CCA 9, 1956). In the *Vitco* case, libelant signed articles on a tuna vessel "for a term of time not exceeding twelve calendar months".

The union contract provided:

"For boats fishing tuna all year around, there shall be two tuna seasons within a year, one season shall commence on January 1, and end on the following June 30 and the next tuna season shall commence on July 1 and end on the following December 31."

As stated in appellants' brief at page 40, the libelant in *Vitco* fell ill in late January and left the vessel at that time. Under these circumstances, the trial court held that he was entitled to his share of the catch for the second half as well as the first half of the year, notwithstanding the fact that libelant did not serve beyond the first month of the first season. In support of its conclusion (which was quite comparable to the conclusion reached by the court in this case), the trial court in the *Vitco* case relied on the ancient and unique principles of maritime law relating to unearned wages, whereas in the instant case, the court need only look to the elementary principles of contract damages discussed *supra* to sustain libelant's award. This is a simple contract damage case and appellants' attempt to apply isolated maritime principles, frequently out of context, serves

only to confuse rather than to clarify.

The precise measure of damages awarded by the court were based on Admitted Facts 6 and 7 contained in the pretrial order:

"6. That Arne Haugen (the person who took the position in the crew of the FV "SEA STAR" which libelant claims should have been his) earned the sum of \$10,744.61 for the crab fishing season of 1963 and that Mr. Haugen earned the additional sum of \$4,526.36 in the year 1964 as a member in the crew of said vessel until he left said vessel due to injury in March, 1964. (R.22)

"7. That libelant from August 10, 1963 through December 31, 1963, earned the sum of \$1,644.31 in the crew of the FV "CHELSEA" and libelant earned the additional sum of \$499.44 through April 24, 1964 in the crew of said vessel." (R.22)

Based upon the above admitted facts and the abundance of testimony previously discussed, the court made the following computation of damages:

Haugen's earnings on the FV "SEA STAR", August 13, 1963 through March, 1964.	\$15,270.97
Libelant's earnings by way of mitigation of damages during above period.	2,143.75
	<hr/>
	\$13,127.22

CONCLUSION

The above figure of \$13,127.22 is the amount of damages libelant asked for, the amount proven on trial, and the

amount awarded by the court. The judgment should be affirmed.

Respectfully submitted,

LEVINSON & FRIEDMAN

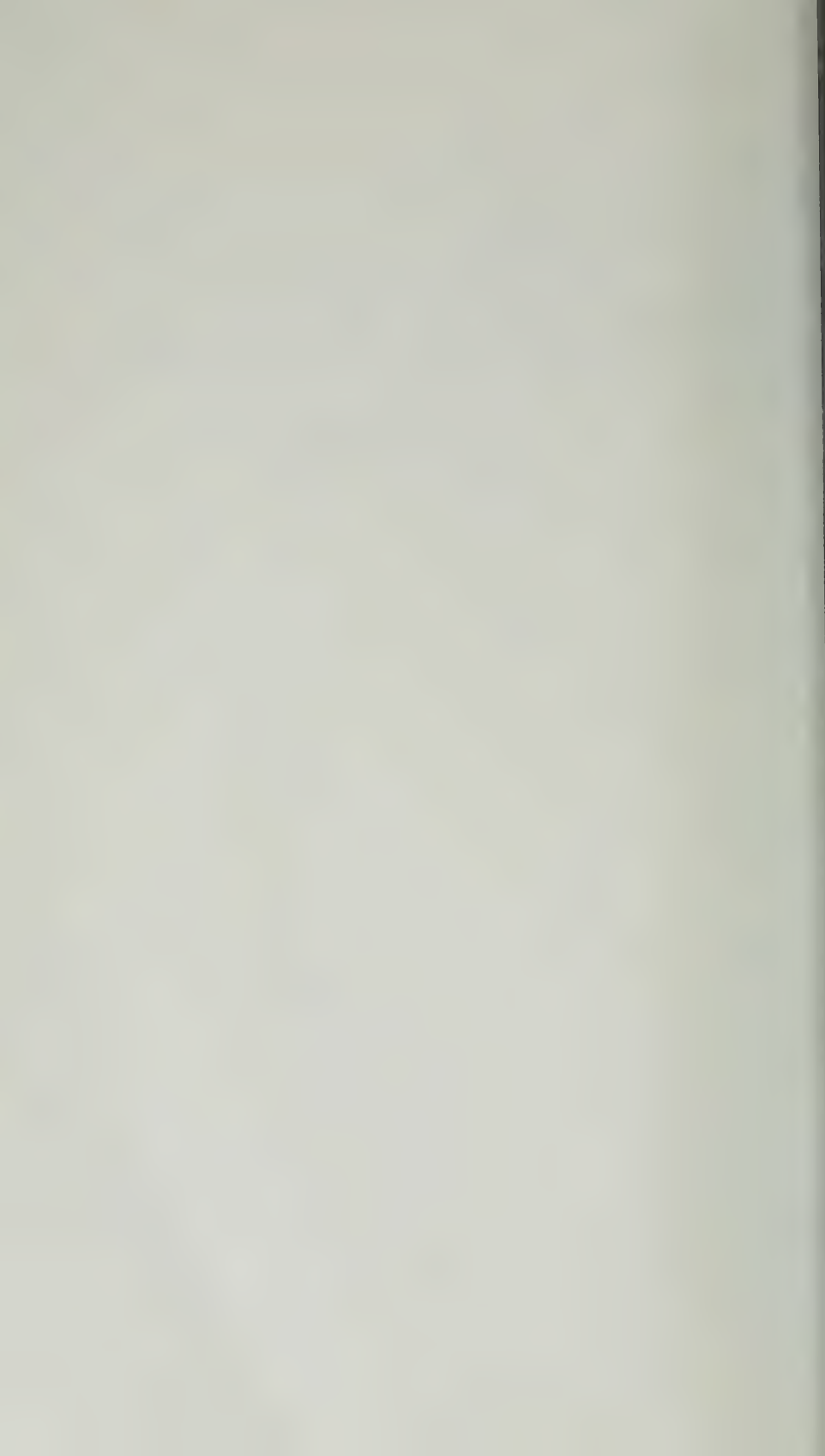
By: RONALD J. BLAND

Proctors for Libelant

CERTIFICATE

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing brief is in full compliance with these rules.

(s) RONALD J. BLAND
Proctor



No. 20309

IN THE
United States Court of Appeals
For the Ninth Circuit

OLA HENDRICKS and JANE DOE HENDRICKS, his wife, and
THORLEIF PETERSEN and JANE DOE PETERSEN, his wife,
Appellants,

v.

OLAF ONA,
Appellee.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT OF THE WESTERN DISTRICT OF
WASHINGTON

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANTS

FERGUSON & BURDELL
W. WESSELHOEFT
Proctors for Appellants

Office and Post Office Address:
929 Logan Building
Seattle, Washington 98101

FILED

OCT 1 1965



SUBJECT INDEX

	<i>Page</i>
Statement of Pleadings and Facts.....	1
Concise Statement of the Case.....	2
Geographical	2
The Contract	2
Nature of the Fishing Operation.....	4
Notice to Appellee.....	4
Damages	7
Post-Trial Motions Following the Trial.....	10
Specifications of Error	10
Argument	12
Specifications 1 to 4	12
Outline of Argument	12
(A) Introductory	13
(B) Applicable Law	14
1. Scope of Review of Admiralty Case.....	14
2. Review on Non-Conflicting Evidence.....	15
(C) Testimony as to Custom.....	16
(D) Testimony as to Alternative Means of Communication	17
(E) Promptness With Which Message Was Sent	19
(F) Conflicting Testimony as to the Date the Letter Was Mailed.....	20
(G) Monday v. Tuesday.....	21
Specification 5	22
Outline of Argument	22
(A) Introduction	23
(B) Conclusion II Is Based Upon Erroneous Findings	23

	<i>Page</i>
(C) Anticipatory Breach	23
(D) The Libel Should Have Been Dismissed.....	26
Specification 6	26
Outline of Argument	26
(A) Introductory	26
(B) Age	27
(C) Health	27
(D) Ability	28
(E) Summer v. Autumn Fishing.....	28
(F) Ness' Opinion Testimony.....	29
(G) Appellee's Actual Employment.....	29
(H) Basis of Trial Court's Finding.....	30
Specification 7	30
Outline of Argument	30
(A) Introductory	31
(B) If Ordinary Contract Damages Are Applica- ble to This Case, the Amount of Damages Must Be Established With Reasonable Cer- tainty	31
(C) There Is No Evidence From Which the Trial Court Could With Reasonable Certainty Find That Appellee Would Have Remained on the Vessel After Ness Took Over Com- mand	32
(D) Evidence as to Haugen's Earnings Until Ness Assumed Command	33
Specification 8	34
Outline of Argument	34
(A) A Special Rule of Substantive Law Applies to Damages for the Wrongful Discharge of a Seaman	35

	<i>Page</i>
(B) That Measure of Damages Is the Same as With a Seaman Who Takes Ill on a Voyage....	36
(C) The Case Authorities Define "Season" and "Voyage" on the Basis of the Period for Which the Seaman Is Hired.....	37
(D) There Is No Evidence That Appellee Was Hired for More Than the 1963 Crab Fishing Season	43
(E) Evidence as to Haugen's Earnings in 1963 Season	46
Specification 9	46
Conclusion	46
Appendix Re Exhibits	48
Certificate of Compliance.....	48

TABLE OF CASES

<i>Aird v. United States</i> , (CA 3rd 1954) 216 F.2d 149.....	36
<i>Alaska Steamship Company v. Gilbert</i> , (C.A. 9th) 236 Fed. 715	35
<i>Farrell v. United States</i> , 336 U.S. 511, 69 S.Ct. 707, 93 L.Ed. 850.....	37-38
<i>Fish v. Richfield Oil Corporation</i> , (DC S.D. Calif. 1959) 178 F. Supp. 750.....	38-39
<i>Keesling v. Seattle</i> , 52 Wn.2d 247, 324 P.2d 806.....	32
<i>Luksich v. Misetich</i> , (CA 9th 1944) 140 Fed.2d 812.....	41-42, 43
<i>McAllister v. United States</i> , 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 3	15
<i>Medina v. Erickson</i> , (CA 9th 1955) 226 F.2d 475.....	39
<i>Palmiero v. Spada Distributing Co.</i> , (CA 9, 1954) 217 F.2d 561.....	25

	<i>Page</i>
<i>Pappas v. Zerwoodis</i> , 21 Wn.2d 725, 153 P.2d 170 (1944)	32
<i>Strong v. United States</i> , (CA 1, 1931) 46 F.2d 257.....	16
<i>The Topgallant</i> , (DC Wash. 1898) 84 Fed. 356.....	36
<i>U. S. v. S.S. Soya Atlantic</i> , (CA 4th, 1964) 330 F.2d 732	15
<i>Vitco v. Joncich</i> , (DC S.D. Calif. 1955) 130 F. Supp. 945	40-41
<i>Vitco v. Joncich</i> , (CA 9th, 1956) 234 F.2d 161....	41, 43, 44
<i>Walker v. Herke</i> , 20 Wn.2d 239, 147 P.2d 255.....	25

STATUTES

28 U.S.C., Sec. 591.....	2
28 U.S.C., Sec. 1333	2

TEXTBOOKS

2 Am. Jur.2d 754, §61	2
5 Am. Jur.2d 288, §845.....	16
12 Am. Jur., §393, Contracts	25

IN THE
United States Court of Appeals
For the Ninth Circuit

OLA HENDRICKS and JANE DOE HENDRICKS,
his wife, and

THORLEIF PETERSEN and JANE DOE PETERSEN,
his wife,

Appellants,

No. 20309

v.

OLAF ONA,

Appellee.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT OF THE WESTERN DISTRICT OF
WASHINGTON

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANTS

STATEMENT OF PLEADINGS AND FACTS*

This is an appeal arising out of a libel *in personam*.

Appellee is a fisherman. Appellants are owners of a fishing vessel and residents of the Western district of Washington. Appellee alleges in his libel that he entered into an oral contract with appellant Hendricks, the master of the vessel, to serve as a member of the crew, that appellants breached the contract and that appellee was thereby damaged (R. 1, 2). In their answer, appel-

**Guide to Terminology and Abbreviations Used in this Brief.* The abbreviation "R" is used to designate the page of the record of the pleadings, motions, judgment and similar documents. The abbreviation "Tr" is used to designate the page of the testimony and trial proceedings.

lants deny the contract and its breach by appellants and affirmatively allege a breach by appellee (R. 4, 5).

The contract as alleged was maritime in nature. 2 Am. Jur.2d, Sec. 61, p. 754. Hence, it comes within the original jurisdiction of the United States District Court for the Western district of Washington, 28 U.S.C. Sec. 1333.

The trial court found in favor of appellee and awarded judgment against appellants. The latter have appealed from the judgment. This court has jurisdiction of appeals from all final decisions of U. S. District Courts, 28 U.S.C. Sec. 591.

CONCISE STATEMENT OF THE CASE

Geographical

The three places involved are Seattle, Kodiak and Adak. Kodiak is a large island off the south coast of Alaska. Adak is a small island at the center of the Aleutian chain. A navy base is located at Adak, and for a fisherman to get to that island by plane involves considerable red tape (Tr. 374).

The Contract

Appellants are joint owners of the fishing vessel *Sea Star*. Appellant Hendricks was master of the vessel during most of the period in question. Appellant Petersen is a Seattle business man. The crew is hired by the master on a share or "chance" basis (Tr. 22).

Appellee, a fisherman, was 63 years old when he and

appellant Hendricks had an oral conversation in the late spring of 1963 (Tr. 64). There is a conflict in the testimony as to what was said, but the trial court resolved this conflict by making certain findings with which no issue is taken here. It found that these two parties made an oral contract under the terms of which appellee was to join the vessel in Alaskan waters in August of 1963 and to receive as a compensation for his services a full share of the catch in accordance with the custom in the crab fishing industry (Finding V, R. 33). He was to be employed as a seaman and fisherman for the "coming crab fishing season" (Finding IV, R. 33).

At the time of this oral conversation the vessel was in Seattle. It was scheduled to and, in fact, did depart for Alaskan waters late in June (Tr. 30). The reason that appellee did not depart with the vessel was that under the terms of the oral contract he was to be a replacement for another crew member, Dennis Petersen. The latter was scheduled to leave the vessel in August, and appellee was to fly to Alaska to join the vessel then (Tr. 8, 76). Appellant Hendricks told appellee that he would be notified by appellant Petersen as to when to go to Alaska to join the vessel (Tr. 81).

There was no express agreement as to how much notice appellee was to be given (Finding VIII, R. 33), nor was there any testimony as to a discussion of the means of communication between appellant Hendricks on the boat and appellant Petersen in Seattle.

Appellee placed his sea bag aboard the vessel in Seattle,

pursuant to what the trial court found to be a directive by appellant Hendricks (Finding VII, R. 33, 34) and waited in Seattle to receive notice from Petersen to fly to Alaska.

Dennis Petersen, the man who was to be replaced by appellee, is the son of appellant Petersen (Tr. 256).

Nature of the Fishing Operation

Crab fishing in Alaskan waters is done by the use of crab pots. These wooden pots are prepared in Seattle and stacked on the vessel's deck and taken north. They are placed overboard with ropes and buoys attached and routinely hauled in with the use of a power winch (Tr. 164). As they come in, the ropes are coiled and the pots are stacked on deck. The latter operation requires that the fishermen climb on top of the pots (Tr. 168).

Vessels such as the *Sea Star* operate with mother vessels. The function of the mother ship is to receive and process the crabs (Tr. 359). It remains in a certain place for awhile and then issues oral orders to the masters of the crab fishing vessels to the effect that the whole operation will move elsewhere (Tr. 360, 361).

Notice to Appellee

For a while the mother ship in question was in Moshier Bay at Kodiak Island. Appellant Hendricks received orders from its master to proceed to Adak (Tr. 362). On that same day appellant Hendricks observed Dennis Petersen writing a letter to his father. He

instructed the young man to include in the letter the following message:

That Petersen was to contact appellee and see if he was available to come to Alaska by the following Monday to join the vessel because orders had been received to proceed to Adak; that if appellee was not available, Petersen was to contact and offer the job to one Arne Haugen. (Tr. 366)

Young Petersen included the message in the letter. It was mailed that same morning (Tr. 367, 368). Once or twice each day a plane picks up mail from the mother ship (Tr. 367). It takes one or two days for an airmail letter to get from Moshier Bay to Seattle (Tr. 367).

There was testimony as to other possible methods of sending the message, namely, direct radio or radio telephone. Appellant Hendricks testified that it was practically impossible to communicate by direct radio from the boat (Tr. 369). A radio telephone was located in a cannery at Moshier Bay. However, it is very difficult for an outsider to make a call on it (Tr. 373).

The letter arrived at appellant Petersen's home in Seattle on the morning of Saturday, August 10. Petersen was at his office and received a phone call from his wife advising him of its contents (Tr. 307, 308).

Between nine and ten o'clock that morning, Petersen called appellee and told him that he was expected to join the vessel on Kodiak Island the following Monday (Finding IX, R. 34).

There is a conflict in the testimony as to what appellee said in response to this directive. The conflict is re-

solved by the court's finding that appellee informed Petersen that he was willing to join the vessel later in the following week (Finding XI, R. 34). On the basis of this response, appellant Petersen proceeded to hire Arne Haugen for the job. Later in the day he advised appellee's wife that appellee was not to join the vessel (Finding XII, R. 34, Tr. 329-331).

When appellant Hendricks sent the message to Petersen, he was not familiar with the then existing flight schedules between Seattle and Kodiak, although he had had experience in leaving Seattle on Sunday and arriving on Kodiak on Monday (Tr. 390). He knew he was under orders to leave for Adak the following Monday (Tr. 393). For a man to fly from Seattle to Adak would have involved much red tape and extra expense (Tr. 374).

In fact, there was no flight by which a man could arrive in Kodiak on Monday (Ex. A5).

There is some conflict in the testimony between Petersen and Haugen as to Haugen's response to the directive that he be in Kodiak by Monday. Haugen states that he told Petersen that he couldn't arrive till Tuesday (Tr. 196). Petersen does not recall this.

Appellants pleaded that the notice given was in accordance with the custom of the fishing industry (R. 26). Several fishermen testified as to this custom. Appellant Hendricks stated that in his opinion a man waiting on call for a job should be ready to be up there in twenty-four hours or less (Tr. 376). Other witnesses testified

to the same effect (Tr. 160, 198). Appellee did not present testimony to the contrary.

The trial court, however, found that the notice given to appellee "was improper, untimely and unreasonably short under the circumstances" (Finding X, R. 34). On the basis of this finding, the trial court went on to find (1) that in telling Petersen that he was willing to join the vessel later in the following week, appellee acted reasonably (Finding XI, R. 34) and (2) that in not providing appellee with the job, appellants breached their contract (Finding XII, R. 34).

Appellants take issue with these findings.

Damages

The replacement fisherman, Haugen, joined the vessel and it departed immediately for Adak (Tr. 198).

At the end of October or the first of November, appellant Hendricks left the vessel and one Magne Ness replaced him as master. Ness hired two more crew members (Tr. 162). Haugen remained on the vessel as a member of the crew until the end of the crab season in December of that year when the vessel returned to Seattle. Haugen returned to work on the vessel for most of the crab fishing season in the spring of 1964.

In fixing damages, the trial court used the earnings of Haugen through the spring of 1964 and subtracted therefrom the sums which appellee earned elsewhere in the meantime (Conclusion II, R. 35).

There are two cut-off points with which we are concerned on this appeal.

The first cut-off point is the point at which Ness took over as master. It is customary for the master to discharge a man who isn't performing his work satisfactorily (Tr. 163). Ness testified that he had worked with appellee in connection with getting the crab pots ready for the trip. Appellee's work was slow. Ness prepared about thirteen pots while appellee prepared about seven (Tr. 163). Ness further testified that, in his opinion, appellee could not have stacked the pots on deck in the course of fishing operations (Tr. 167). This is one of the principal jobs performed aboard the vessel (Tr. 167, 168). The same witness also testified that, if appellee had joined the vessel in Alaska and had not been able to stack pots, the witness would have fired appellee when he took over as master (Tr. 187). The witness expressed the opinion that he would not have kept plaintiff as a member of the crew, as plaintiff was too old for the job (Tr. 43, 44).

Moreover, autumn fishing work is a lot harder than summer fishing work. The rough waters encountered in the latter season make it more difficult for the crew to handle the empty pots (Tr. 378).

Appellee obtained employment on another vessel some time after his telephone conversation with Petersen. This was employment in the pilot house rather than on deck (Tr. 142).

Appellants contend that the court in assessing damages

should have determined that appellee would not have remained on the vessel after Ness took over as master.

The second cut-off point is the end of the crab fishing season in December. The trial court's finding was that appellee was hired for "the coming crab fishing season" (Finding IV, R. 33).

There was considerable testimony as to what constituted the "season." Ness testified that the season is considered to be over when the vessel returns to Seattle and that another season starts when the vessel goes north the following February (Tr. 180, 181). Another witness testified that the season runs from summer till December (Tr. 317).

No witness testified that the crab fishing season runs from the beginning of summer through the following spring.

The pre-trial order recites among the admitted facts that the 1963 crab fishing season of the *Sea Star* lasted from June 22, 1963, to December 10, 1963 (R. 22).

All witnesses who testified on this subject concurred in their view that, once a fisherman is hired, he may remain on the vessel for several seasons. His oral contract is renewed each time. Thus, if a man is hired in the early summer and does a reasonably good job, he is likely to be rehired for the following spring season (Tr. 23).

The trial court allowed appellee damages on the basis

that, once aboard, he would have continued to work on the vessel through the spring crab season in 1964, as Haugen, in fact, did. Appellants contend that the trial court applied the wrong rule of law in this regard. "Wages to the end of the season" should be interpreted to mean wages to the end of the season for which the fisherman is hired.

Post-Trial Motions Following the Trial

Appellants made timely motions to dismiss the cause or, in the alternative, to reduce the award by allowing damages only for (1) the period until Ness took over as master, or (2) the season ending in December, 1963, or, in the alternative, for a new trial. These motions were all denied and judgment was entered against the appellants in the amount of \$13,127.22. This appeal follows.

SPECIFICATIONS OF ERROR

1. Finding VIII is erroneous in the words "but it is reasonably implied that libelant would be notified by respondents reasonably in advance of the date he was expected to join the vessel on Kodiak Island" because it is not supported by the evidence.

2. Finding X is in error in its entirety, namely "that the notice given by respondent Petersen was improper, untimely and unreasonably short under the circumstances" because it is not supported by the evidence.

3. Finding XI is in error in the words "that at all times material herein, libelant was ready, willing and able to perform his contractual obligation in accordance

with the aforesaid contract to serve in the crew of the F.V. *Sea Star*" because the same is contrary to the uncontradicted evidence of custom.

4. Finding XII is erroneous in its entirety, namely,

" . . . that later, on August 10, 1963, without good cause, or notice, respondent Petersen wrongfully and unlawfully breached the aforesaid contract by advising libelant's wife that libelant's services were not wanted and that he should not join said vessel."

for the reason that sufficient notice was in fact given to libelant.

5. Conclusion of Law I is erroneous because it is based upon erroneous findings and because of an anticipatory breach by appellee.

6. Finding XIII is not supported by the evidence in that the evidence preponderates to the effect that appellee would not have remained on the vessel after Ness assumed command.

7. Conclusions of Law II and III are contrary to law in that damages were improperly assessed. There is no evidence from which the court could find with reasonable certainty that appellee would have remained on the vessel after Ness took over command.

8. In the alternative to Specification 7, damages were improperly assessed in that the season for which appellee was hired ended in December, 1963.

9. The trial court erred in denying appellants' post trial motions to dismiss the cause or to reduce the awards in accordance with the contentions set forth in Specifications 7 and 8 above, or for a new trial.

ARGUMENT**Specifications 1 to 4***Specification 1*

"Finding VIII is erroneous in the words 'but it is reasonably implied that libelant would be notified by respondents reasonably in advance of the date he was expected to join the vessel on Kodiak Island' because it is not supported by the evidence."

Specification 2

"Finding X is in error in its entirety, namely 'that the notice given by respondent Petersen was improper, untimely and unreasonably short under the circumstances' because it is not supported by the evidence."

Specification 3

"Finding XI is in error in the words 'that at all times material herein, libelant was ready, willing and able to perform his contractual obligation in accordance with the aforesaid contract to serve in the crew of the F.V. *Sea Star*' because the same is contrary to the uncontradicted evidence of custom."

Specification 4

"Finding XII is erroneous in its entirety, namely 'that later, on August 10, 1963, without good cause, or notice, respondent Petersen wrongfully and unlawfully breached the aforesaid contract by advising libelant's wife that libelant's services were not wanted and that he should not join the said vessel' for the reason that sufficient notice had in fact been given to libelant."

Outline of Argument**(A) Introductory****(B) Applicable Law****1. Scope of Review of Admiralty Case**

2. Review on Non-Conflicting Evidence

- (C) Testimony as to Custom
- (D) Testimony as to Alternative Means of Communication
- (E) Promptness With Which Message Was Sent
- (F) Conflicting Testimony as to the Date the Letter Was Mailed
- (G) Monday v. Tuesday.

(A) Introductory

The first four specifications all involve findings of fact. They are considered together in argument because they all involve the same issue. The findings are as follows:

“Finding VIII. There was no express agreement as to how much notice in point of time would be given by respondents to libelant respecting the beginning fishing work date, but it is reasonably implied by the parties that libelant would be notified by respondents reasonably in advance of the date he was expected to join the vessel on Kodiak Island, Alaska, to replace Dennis Petersen, respondent Thorlief Petersen’s son, when Dennis Petersen returned to Seattle in August, 1963.” (R. 33, 34)

“Finding X. That the notice given by respondent Petersen was improper, untimely and unreasonably short under the circumstances.” (R. 34)

“Finding XI. That at all times material herein, libelant was ready, willing and able to perform his contractual obligation in accordance with the aforesaid contract to serve in the crew of the F.V. *Sea Star* and that libelant so informed respondent Petersen in their telephone conversation on August 10, 1963, and that libelant was willing to join the vessel

later in the following week which would have been reasonable." (R. 34)

"Finding XII. That later, on August 10, 1963, without good cause, or notice, respondent Petersen wrongfully and unlawfully breached the aforesaid contract by advising libelant's wife that libelant's services were not wanted and that he should not join the vessel." (R. 34)

The issue in question is notice. Each of these findings directly involves this question. In Finding VIII, the trial court found an unspoken implication as to notice. In Finding X, it found that the notice which was actually given was unreasonable. In Finding XI, it found that appellee was entitled to sufficient notice so that he did not breach his contract when he said that he was not willing to join the vessel until later in the following week. In Finding XII, it found that appellant Petersen, in telling appellee that his contract was cancelled (because he would not join the vessel until later in the week), acted without good cause.

It would be a waste of space in this brief to consider each of these findings separately.

The evidence bearing on the subject of notice is essentially non-conflicting. It consists of (a) testimony as to custom with regard to notice and (b) testimony as to the alternative means by which Hendricks might have communicated with Petersen.

(B) Applicable Law

1. Scope of Review of Admiralty Case

In reviewing a judgment of a trial court sitting without

a jury in admiralty, a court of appeals may not set aside the judgment below unless it is clearly erroneous. A finding is purely erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *McAllister v. United States*, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 3.

"It is now settled beyond all question that appeals in admiralty are not trials *de novo*, and that our scope of review is no broader than that of factual contentions in non-admiralty cases tried to a district court without a jury. The District Court's findings are binding upon us unless clearly erroneous. While we cannot say that the conflicting evidence would not have supported contrary findings, it was for the District Court to resolve the conflicting evidence on the subsidiary factual questions and, since the findings which he actually made are supported very substantially, we cannot disregard them." *U.S. v. S.S. Soya Atlantic*, (CA 4th 1964) 330 F.2d 732, 735.

2. Review on Non-Conflicting Evidence

It is significant to note that the portion of *U.S. v. S.S. Soya Atlantic*, quoted immediately *supra*, refers to "the conflicting evidence."

From the standpoint of a reviewing court, there is a basic difference between a finding of fact resting upon a conflicting evidence and a finding of fact resting upon non-conflicting evidence.

"A finding of the trial judge which rests on conclusions drawn from undisputed facts or nonconflicting evidence generally does not carry the same weight on appeal as a finding resting on disputed

fact or conflicting evidence, but may be treated on appeal as if it were a legal conclusion, subject to the principle that where a point of law is concerned, the appellant court is not committed by the view taken by the court below. It has similarly been said that where uncontradicted evidence admits only of one conclusion, a finding contrary thereto cannot stand on appeal." 5 Am. Jur. 2d § 845, pp. 288, 289; *Strong v. United States*, (CA 1 1931) 46 F.2d 257.

(C) Testimony as to Custom

This case deals with a specialized industry. Appellants pleaded that the notice given was in accordance with the custom of this industry (R. 26). Testimony on this subject was properly admitted.

Appellant Hendricks stated that, in his opinion, a man in Seattle waiting on call for a job should be ready to be in Kodiak within 24 hours or less (Tr. 376). The witness Ness testified:

"Well, my opinion is that if a guy is given a notice, he has to come right there and then; if he can't—if he can't be there, I mean within such a time limit, why you have got to look for somebody else." (Tr. 160)

The witness Haugen testified as follows:

"Q. Now, Mr. Haugen, have you observed any custom in the fishing industry with respect to how much notice a fisherman is given by a master before he is to join the ship?

"A. No. If you are waiting for a job, you have to be prepared to be there when they want you.

"Q. This is your observation of the custom, is that right?

"A. Yes. Yes." (Tr. 198, 199)

There was no evidence to the contrary.

It is undisputed, therefore, that a fisherman hired to stand by for orders to go north is supposed to be ready to go at once. Finding VIII that "it is reasonably implied by the parties that libelant would be notified by respondents reasonably in advance of the date he was expected to join the vessel on Kodiak Island" (R. 33, 34) is not supported by the evidence.

(D) Testimony as to Alternative Means of Communication

Appellant Hendricks received his instructions from another ship to proceed to Adak. In order to avoid the extra expense and red tape of having Dennis Petersen replaced at Adak, he undertook to arrange for the replacement at Kodiak. The means of communication which he selected was the mail. He testified that in his experience it takes one or two days for an airmail letter to get from Moshier Bay to Seattle (Tr. 367).

He could have attempted to send the message by radio from his vessel. He testified as to why he did not.

"Q. Now, have you had experience in Alaskan waters with attempts to reach Seattle with the radio on the *Sea Star*?

"A. Yes, I have.

"Q. Had you made attempts to reach Seattle from Alaskan waters at any time prior to the day on which this letter went out?

"A. Yes.

"Q. And will you tell us, generally, what success you had in your attempts to use the radio?

"A. We had—I have never had any success.

"Q. What troubles have you run into?

"A. The only—the only way that we can call Seattle is through the marine operator in Seattle. It is called KOW, that is their station. And, due to all the local interference around there, it is just—pretty near impossible to get through from Alaska. I have never been able to make one call since I have owned and operated the *Sea Star*. I have tried on many, many occasions, but not once have I got through." (Tr. 369)

There is no testimony to the contrary.

He could also have attempted to send a message by means of a radio telephone located in a cannery at Moshier Bay. In fact, a telegram was sent to Hendricks by appellee after appellee was told by Petersen that he was not to join the vessel. This telegram was received through the radio telephone at the cannery (Tr. 371). When it was received, Hendricks went ashore and used this radio telephone to call Petersen and discuss the matter (Tr. 371, 372).

The difficulties incident to the use of this radio telephone were related by Hendricks in connection with his call to Petersen. It involved taking an hour-long trip across the bay in a 10-foot fiberglass skiff. Hendricks described it as follows:

"It is dangerous business to go out in a little skiff like we have there on Moshier Bay, in any condition."
(Tr. 372)

This testimony is not contradicted.

The mechanics of making the call itself were also described by Hendricks.

“Q. And what kind of a speaking device was there for this call?

‘A. It is by radio. The only way that the cannery themselves can make a call, as in this instance, ask them; they have a schedule twice a day: one in the morning, and one at night, that they have a schedule with the operator at Kodiak. And they have—then, whatever messages they have to send out, will be sent on this time, and then they are through until the next schedule. And they are, during this time of the year, they are so busy that they, in order for us to come in there, well, they don’t like to do it. That’s why it is very difficult to—to make a ’phone through that cannery.

“Q. Now, how long did it take you from the time you got in to the cannery to—before you got the call through to Mr. Petersen, on that occasion?

“A. Well, we had to wait an hour, until the schedule time was on; just about an hour we had to wait until their turn was to be on the schedule.” (Tr. 373, 374)

This testimony is uncontradicted.

(E) Promptness with which Message Was Sent

Hendricks testified that Dennis Petersen’s letter was sent the very same day that Hendricks received instructions from the mother ship that he would be proceeding to Adak (Tr. 362). He testified further as follows:

“A. If I had a month’s notice myself, I would have given him a month’s notice.

“I notified Olaf the minute I got my notice myself, and that is the best I could do under the circumstances.” (Tr. 386)

This testimony is also uncontradicted.

(F) Conflicting Testimony as to the Date the Letter Was Mailed

The only conflict in the evidence on the issue of notice is in the testimony as to the day the letter was mailed. (The letter itself was thrown away by Petersen (Tr. 61) and therefore only secondary evidence as to its contents was admitted.)

Hendricks testified that the letter was mailed Thursday (Tr. 387). Dennis Petersen said it was mailed Monday, Tuesday or Wednesday (Tr. 270). The trial court did not make a specific finding as to when it was mailed. However, in defending Finding X, appellee will undoubtedly argue from this testimony by young Petersen.

There is some significance as to when the letter was mailed. It arrived in Seattle Saturday. If it was mailed on Thursday, as Hendricks said it was, it was an appropriate method of communication. If it was mailed earlier in the week, it would appear to be a less appropriate method.

There is a strong preponderance of evidence in favor of the letter's having been mailed on Thursday. Here are the reasons:

1. Hendricks was in a much better position to recall the date of the letter than Dennis Petersen. The message which Hendricks arranged to have included was a business message of some importance. From Dennis Petersen's standpoint, on the other hand, this was just a personal or family type letter (Tr. 261).

2. Hendricks' testimony on the subject was clear. He said:

"I think it was sent on Thursday." (Tr. 387)

Dennis Petersen's testimony, on the other hand, was relatively vague. He did not pinpoint a specific day. He places it somewhere within a three-day period. Moreover, these three days were suggested on cross-examination.

"Q. Do you know—did you write that letter to your dad on Tuesday or Wednesday of the preceding week?"

(Colloquy)

"One week before Mr. Haugan joined the vessel; is that about when you wrote the letter?"

"A. Approximately.

"Q. And would it certainly have been either Tuesday or Wednesday—Monday, Tuesday or Wednesday, that you wrote that letter?"

"I mean, would it have had to have been one of those three days?"

"A. Yes." (Tr. 269, 270)

3. A Thursday mailing is consistent with the usual mail schedule. A plane picks up mail from the mother ship in Moshier Bay once or twice each day (Tr. 367). It takes one or two days for an airmail letter to get from Moshier Bay to Seattle (Tr. 367).

(G) Monday v. Tuesday

It is anticipated that appellee will place considerable emphasis on the fact that Petersen directed him to be at Moshier Bay Monday, when, in fact, that was impossible.

Haugen did not arrive until Tuesday. From this appellee will argue that appellants impose a condition which was impossible of performance.

At the time Hendricks sent the message to Petersen, he was not fully acquainted with the then existing commercial flight schedules between Seattle and Kodiak (Tr. 390). He had had experience with these flights in the past. He testified as follows:

“ . . . I specified Monday. I—I used to go up there; I used to go up to Anchorage, from Anchorage to Kodiak. I have left Sunday from Seattle, going to Anchorage, and got to Kodiak on Monday. I have, myself, a number of occasions.” (Tr. 390)

When Petersen talked to appellee on the phone on Saturday morning, the subject of flight schedules did not come up. Petersen simply told appellee that he was to proceed to Kodiak and get there by Monday (Tr. 309). Appellee answered in these words:

“I have some business to take care of, and I can’t be up there before the later part of the week.” (Tr. 309).

Appellants submit that the ordinary meaning of the words, “the later part of the week,” is Thursday or Friday—perhaps Wednesday at the earliest.

Specification 5

Conclusion of Law I is erroneous because it is based upon erroneous findings and because of an anticipatory breach by appellee.

Outline of Argument

(A) Introduction

(B) Conclusion II is based upon erroneous findings

(C) Anticipatory breach

(D) The libel should have been dismissed

(A) Introduction

Conclusion of Law I is as follows:

“That the notice to join the vessel given to libellant by respondent Petersen on August 10, 1963, was untimely, unreasonable and improper and that, notwithstanding libellant’s acknowledged willingness to join said vessel later in the following week, which would have been reasonable, respondent Petersen wrongfully repudiated the aforesaid contract of employment later on the same date.” (R. 35)

It is actually a repetition of Findings VII, X, XI and XII.

(B) Conclusion II Is Based upon Erroneous Findings

In the previous section of this brief, appellants have set forth reasons why these four findings are erroneous.* Those reasons are incorporated here again by reference.

(C) Anticipatory Breach

The only portion of this conclusion that amounts to more than a pure finding of fact is that portion reading

“. . . respondent Petersen wrongfully repudiated the aforesaid contract of employment later on the same date.”

This portion is itself a repetition of Finding XII.

*See argument on Specifications 1-4.

It might be classed as a mixed question of law and fact. The facts were all discussed in the previous section of this brief, namely, that (1) the notice given by Petersen to appellee was within the custom of the industry, (2) that Hendricks' selection of the means of communication was reasonable under the circumstances, (3) that the stated condition that appellee arrive by Monday was made without knowledge of the then existing airline schedules and on the basis of Hendricks' previous experiences therewith, and (4) that airline schedules were not referred to in the conversation between Petersen and appellee.

If appellee had said that he couldn't arrive at Kodiak Island until Tuesday because of the airline schedules, this court would be faced with a very different situation. Appellants would have imposed a condition which was impossible of performance, and appellee would have failed to comply because of this impossibility.

Here, however, appellee stated that he would not comply because he had other business to attend to (Tr. 309).

Under the undisputed evidence appellants had the right to require that appellee arrive at Kodiak Island by Tuesday. This was entirely possible of performance and was in fact performed by Haugen (Tr. 197, 201). Appellee's statement that he would not comply with this condition constituted an anticipatory breach of the contract.

Under the undisputed evidence, this was an important

condition. *Hendricks had orders to leave Kodiak on Monday* (Tr. 393). He had to wait one day for Haugen because of the flight schedules. If he had had to wait until later in the week, it would have been seriously detrimental to the fishing operation (Tr. 160).

Where a party to a contract states that he will not comply with an important condition, that constitutes an anticipatory breach of the contract. *Palmiero v. Spada Distributing Co.*, (CA 9 1954) 217 F.2d 561, is a case which considered the Washington State Law on anticipatory breach. The opinion at page 566 quoted from 12 Am. Jur., "Contracts," § 393, as follows:

"In order to justify the adverse party in treating the renunciation as a total breach, the refusal to perform must be of the whole contract *or of a covenant going to the whole consideration*, and it must be distinct, unequivocal and absolute." (Emphasis supplied)

The same opinion refers to the case of *Walker v. Herke*, 20 Wn.2d 239, 147 P.2d 255. That case in turn holds that where one party has repudiated an executory contract, the adverse party has an election to treat the contract as broken or not.

Clearly, under the undisputed evidence, appellants' right to require that appellee arrive at Kodiak by Tuesday amounted to "a covenant going to the whole consideration." When appellee stated to Petersen that he would not comply with this condition, Petersen had the right to elect to treat the contract as broken. He did so

when he stated to appellee's wife later that day that appellee was not to join the vessel.

(D) The Libel Should Have Been Dismissed

Since Petersen acted within his rights when he elected to treat the contract as broken, the trial court should have dismissed the libel.

Specification 6

Finding XIII is not supported by the evidence in that the evidence preponderates to the effect that appellee would not have remained on the vessel after Ness assumed command.

Outline of Argument

- (A) Introductory
- (B) Age
- (C) Health
- (D) Ability
- (E) Summer v. Autumn Fishing
- (F) Ness' Opinion Testimony
- (G) Appellee's Actual Employment
- (H) Basis of Trial Court's Finding
- (I) Evidence as to Haugen's earnings until Ness assumed command.

(A) Introductory

Finding XIII is as follows:

"That also on August 10, 1963, Arne Haugen was

hired by respondents in libelant's place as a member of the crew in the F.V. *Sea Star* and that libelant's earnings in the crew of said vessel would have been at least equal to those of Arne Haugen during the fall of 1963 and spring of 1964." (R. 34)

This specification of error is not of controlling importance in this appeal. The trial court applied the wrong law of damages in Conclusions II and II, as shall be shown in our arguments on Specifications 7 and 8. In those arguments appellants shall contend that, even if this court determines that Finding XIII is supported by the evidence, the damage award is incorrect and should be reduced.

The evidence discussed under this specification is germane to Specification 7 below and will be incorporated by reference in that argument.

(B) Age

Appellee was 63 years old when he and appellant Hendricks had an oral conversation in the late spring of 1963 (Tr. 64).

(C) Health

On December 10, 1962, a portion of appellee's stomach was surgically removed. Drainage was accomplished through a tube which was removed from appellee on January 11, 1963. He left the U. S. Public Health Hospital four days later (Tr. 404, 405). It is noteworthy that after this suit was commenced appellee went to that hospital and sought to have a "fit for duty" slip

issued to him, dating retroactively back to February, 1963. The hospital refused, as there was no record that he was ever made fit for duty (Tr. 405).

(D) Ability

Ness testified that he and appellee had worked together in connection with getting the crab pots ready for the trip (Appellee was paid specially for this work by appellant Petersen because appellant's son, Dennis Petersen, was unable to perform his share of the preliminary work (Tr. 47, 48)). Appellee's work was slow. Ness testified that he prepared about 13 pots while appellee prepared about 7 (Tr. 153).

(E) Summer v. Autumn Fishing

The 1963 crab fishing operation of the *Sea Star* lasted until December 10, 1963 (R. 22). Appellant Hendricks testified to the difference between a fisherman's work in the summer and that which is performed in the fall.

"Q. Do you have an opinion as to whether there is any difference between the degree of physical strength of a crewman required for summer fishing and that required for November fishing?

"A. Yes, I would say so.

"Q. And would you describe the difference?

"A. Well, we will take these crabpots that we were handling. The empty crabpots themselves weigh, well, approximately three, four hundred pounds. That is empty. We have had up to 2,000 pounds of crabs, live crabs in them, besides that, and in rough seas, where two men, they have got to balance these here, that is quite heavy. That, and in rough—

“Q. What is the connection between that and the degree of physical strength needed?

“A. Well, it takes physical strength to do that.” (Tr. 378).

(F) Ness’ Opinion Testimony

One of the principal jobs performed aboard the vessel is that of stacking the crab pots on the vessel’s deck (Tr. 167, 168) and on some days the crew spends as much as four or five hours on that task. Ness testified that, in his opinion, appellee could not have handled the stacking of pots (Tr. 167). That witness answered a hypothetical question as follows:

“Q. Assume that Mr. Ona had joined the vessel in Alaska, and assume that it developed that he could not participate in the stacking of the crab pots, when you became master, in October, would you have kept him on as a member of the crew?

“A. No, I don’t think so.

“Q. Why not?

“A. Because that is one of the most important parts in the crab fishing is to stack gear, and to move gear. If he wouldn’t have been able to stack the gear, well—well, he wouldn’t—then we had to do it for him, or somebody else had to do it for him, that is the way it works, anyway.” (Tr. 187)

He expressed the opinion that when he took over as master of the vessel, he would not have kept appellee as a crew member because he thought that appellee was “too old for the job” (Tr. 43, 44).

(G) Appellee’s Actual Employment

Appellee worked on another vessel that same season.

It was the *Chelsea*. His function on that vessel was one which he performed in the pilot house (Tr. 142).

(H) Basis of Trial Court's Finding

In arriving at Finding XIII, the trial court relied on the testimony of appellants themselves and certain of the witnesses to the effect that appellee would probably have lasted on the vessel through the 1964 spring fishing season if the quality of his work was satisfactory. In each instance the witness based his opinion on the express assumption that the quality of appellee's work was satisfactory (Tr. 23, 24, 42, 43, 189, 208, 254, 255). It is submitted that there is not evidence in the records to support a finding to the effect that appellee's work would have been sufficiently satisfactory for Ness to have decided to keep him on board during the late part of the season.

Specification 7

Conclusions of Law II and III are contrary to law in that damages were improperly assessed. There is no evidence from which the court could find with reasonable certainty that appellee would have remained on the vessel after Ness took over command.

Outline of Argument

- (A) Introductory
- (B) If Ordinary Contract Damages Are Applicable to This Case, the Amount of Damages Must Be Established With Reasonable Certainty
- (C) There Is No Evidence From Which the Trial Court Could With Reasonable Certainty Find

That Appellee Would Have Remained on the Vessel After Ness Took Over Command.

(D) Evidence as to Haugen's Earnings Until Ness Assumed Command

(A) Introductory

The trial court made Finding XIII (that appellee's earnings would have been at least equal to those of Haugen through the spring of 1964). Then it went on to make Conclusion of Law II as follows:

"That, as a direct and proximate result of respondents' breach and repudiation of the aforesaid contract, libelant sustained damages by way of lost earnings in the sum of \$13,127.22." (R. 35)

and then made Conclusion of Law III as follows:

"That libelant is entitled to a judgment against respondents in the sum of \$13,127.22, plus costs." (R. 35)

The trial court was wrong in making Finding XIII for the reasons set forth in Specification 6 above. Nevertheless, even if there was substantial evidence to support that finding, such evidence would not of itself be sufficient to support these two conclusions.

(B) If Ordinary Contract Damages Are Applicable to This Case, the Amount of Damages Must Be Established With Reasonable Certainty

In this specification, we shall consider the question from the standpoint of ordinary contract damages. This appears to have been the basis of the trial court's award of damages.*

*In the next specification, we shall point out that ordinary contract damages is the wrong measure of damages where a seaman is improperly discharged.

It is appellee's obligation to prove damages for breach of contract with sufficient certainty so as to render the award free from speculation or conjecture. In the case of *Pappas v. Zerwoodis*, 21 Wn.2d 725, 153 P.2d 170 (1944), a case involving an attempt to collect loss of profits from breach of lease, the court said at page 174:

"On the other hand, where special damages, such as loss of profits, are specifically set forth and proved, the recovery by a tenant for breach of his landlord's covenant to repair or other covenant with respect to the use of property is not restricted to the difference in rental value, as expressed in the foregoing general rule, but may also include such loss of profits as has been directly and necessarily caused by the landlord's wrongful act or default. In such case, however, *the loss must be shown with a reasonable degree of certainty and accuracy, and the proof establishing the loss must be clear and convincing, free from speculation or conjecture.* These complementary statements express a rule to which this court is definitely committed." (Emphasis supplied)

In *Keesling v. Seattle*, 52 Wn.2d 247, 324 P.2d 806, the court stated at page 254:

"Where pecuniary damages are sought, there must be evidence not only of their actuality but also of their extent, and there must be some data from which the trier of the fact can with reasonable certainty determine the amount."

(C) There Is No Evidence From Which the Trial Court Could With Reasonable Certainty Find That Appellee Would Have Remained on the Vessel After Ness Took Over Command

Appellee was a relatively old man. While the vessel

was outfitting in Seattle, his work on the crab pots was relatively slow. Ness took over the command of the vessel at the end of October (Tr. 162). He testified that (1) he did not think appellee could stack crab pots at sea (Tr. 167) and (2) if appellee had joined the vessel in Alaska and could not stack pots at sea, he, Ness, would have fired him when he took over as master. The late fall season requires much more arduous work than the summer season (Tr. 378). Appellee obtained another job that season where he worked in the pilot house (Tr. 142).

Hypothetical questions were placed by appellee's counsel to appellants and several other witnesses. All testified that appellee would probably have remained on the vessel through the spring season of 1964 if his work was satisfactory (Tr. 23, 24, 42, 43, 189, 208, 254, 255). The record is barren of evidence that his work—particularly in the late autumn—would have been satisfactory. Finding of Fact XIII is therefore not supported by the evidence.

A fortiori the trial court could not conclude “with reasonable certainty” that appellee was entitled to damages based on Haugen's work on the vessel beyond the time that Hendricks left it as master.

(D) Evidence as to Haugen's Earnings Until Ness Assumed Command

Exhibit A5 is the settlement sheet showing the earnings of crew members up to the time that Ness replaced Hendricks as skipper of the vessel (Tr. 381). According

to that sheet, Haugen received the sum of \$6,960.47. During the same period, appellee actually earned the sum of \$1,644.31 on another vessel. That vessel completed its fishing on October 14, 1963 (Tr. 89), well in advance of when Ness replaced Hendricks as skipper (Tr. 162). Subtracting this sum from Haugen's earnings leaves a difference of \$5,316.16.

Since the trial court could not conclude with reasonable certainty that appellee would have remained on the vessel after Hendricks left it as master, the damage award (if there was to be a damage award at all) should have been \$5,316.16.

Specification 8

In the alternative to Specification 7, damages were improperly assessed in that the season for which appellee was hired ended in December, 1963.

Outline of Argument

- (A) A special rule of substantive law applies to damages for the wrongful discharge of a seaman.
- (B) That measure of damages is the same as with a seaman who takes ill on a voyage.
- (C) The case authorities define "season" and "voyage" on the basis of the period for which the seaman is hired.
- (D) There is no evidence that appellee was hired for more than for the 1963 crab fishing season.
- (E) Evidence as to Haugen's earnings in 1963 season.

(A) A Special Rule of Substantive Law Applies to Damages for the Wrongful Discharge of a Seaman

In Conclusion II the trial court determined that as a proximate cause of appellants' breach of contract, appellee sustained damages by way of lost earnings in the sum of money equal to what Haugen earned on the *Sea Star* through the spring of 1964, less what appellee in fact earned during said period.

In so doing, the trial court ignored the rule of substantive law which was urged in argument by appellants. Stated simply, the rule is that a seaman who is wrongfully discharged is entitled to wages to the end of the voyage or season for which he is employed. Where he is wrongfully discharged in a port other than a port of shipment, he is also awarded the expenses of his layover and return.

"The cases subsequent to *Emerson v. Howland*, (CC Mass. 1816), appear to have followed both rules, some allowing *wages to the end of the voyage* and the amount of the seaman's expenses in returning to the port of shipment, less intermediate earnings, and others to the time the seaman returned to the port plus necessary expenses incurred, if any, and less intermediate wages." (1 Norris "Law of Seamen," 2nd Ed. § 481, p. 504.) (Emphasis supplied)

The case of *Alaska Steamship Company v. Gilbert*, (C.A. 9th) 236 Fed. 715, involved a seaman who was wrongfully discharged at Juneau, Alaska. The trial court had allowed him wages to the end of the voyage plus return fare to Seattle and reimbursement for his necessary stay at Juneau. This court affirmed that decision.

In *The Topgallant*, (DC Wash. 1898) 84 Fed. 356, the court stated by way of dictum at page 357:

“If the captain discharges (the crew) before the termination of the voyage, without justifiable cause, they are entitled to wages *for the entire voyage*, and the amount of their expenses in returning to the port of discharge.” (page 357)

A thorough research has disclosed no cases which apply any other measure of damages than the foregoing or something closely akin thereto.

(B) That Measure of Damages Is the Same as With a Seaman Who Takes Ill on a Voyage

The courts have applied the same measure of damages for the seaman who is wrongfully discharged and for the seaman who is taken ill on a voyage.

The case of *Aird v. United States*, (CA 3rd 1954) 216 F.2d 149, is a case in point. In that case the matter involved a war bonus for a seaman who was wrongfully discharged by the master. The lower court denied the war bonus by applying the same measure of damages as that applicable to the seaman injured on a voyage for reasons other than the unseaworthiness or negligence of the owner or his agents. On appeal, it was argued that a different rationale applied because of the fact that this case involved a breach of contract. The appellate court in affirming the action of the lower court stated that it could perceive no distinction between the two situations which would affect the measure of damage.

There are many more cases which discuss the defini-

tions of "voyage" and "season" with respect to seamen who are injured or taken ill in the course of a voyage than with respect to seamen who are wrongfully discharged. It seems that only a very few of the latter cases have gone to appellate courts. Hence we turn to the former cases for authority on this issue.

(C) The Case Authorities Define "Season" and "Voyage" on the Basis of the Period for Which the Seaman Is Hired

Most cases which discuss the question involve signed articles between the seaman and the ship owner. In some instances these articles are held to be ambiguous or incomplete. Nevertheless, the holdings in each case concur in one basic principle, namely, that *the seaman is not entitled to wages covering a period of time longer than that for which he signed up*.

In the landmark case of *Farrell v. United States*, 336 U.S. 511, 69 S.Ct. 707, 93 L.Ed. 850, a seaman signed articles which were considered to be ambiguous and which provided that he was to make a certain war-time journey out to sea and back to a final port of discharge in the United States for a term not to exceed twelve calendar months. The libelant contended that under the provision of those articles he was obligated to serve for twelve months. The U.S. Supreme Court, in affirming a lower judgment, rejected that argument, stating:

"We think, in the light of the custom of the industry and the condition of the times, there is

nothing ambiguous about it and that it *obligated the petitioner* only for the voyage on which the ship was engaged when he signed on and that, when it terminated at a port of discharge in the United States, *he could not have been required to reembark for a second voyage*. The twelve-month period appears as a limitation upon the duration of the voyage and not as a stated period of employment." (93 L.Ed, p. 857) (Emphasis supplied)

Thus that case establishes that it is the period for which the libellant is committed to serve that operates as the period used in determining the measure of damages.

The question of unearned wages was discussed in *Fish v. Richfield Oil Corporation*, (DC S.D. Calif. 1959) 178 F. Supp. 750. The court in that case, at pages 754-755, stated:

"The question of wages and overtime presents a problem that is not so clear. Concededly, where the employment is for a voyage or a definite period the maximum of recovery, if a seaman is incapacitated, would be the loss of wages for the voyage or the period of employment. Where the articles are of this character no difficulty is presented. Where, as here, the shipping articles are open articles in coastal trade, the problem must be solved by reference to general principles. And I believe that the correct solution is that indicated in one of the cases cited which limits recovery to the wage-payment period.

"As Fish's wages were paid monthly and the employment could be terminated at the end of any of the voyages, far short of a monthly period, the period of one month is fair and equitable to adopt. It accords with the principle which obtains generally in the law of contracts of employment that

where no definite term is fixed, the periodic compensation, whether by the week or by the month, may be used to determine the duration of the employment. So, in this case I am of the view that while the contract was terminable by Fish or Richfield at the end of a voyage that could have lasted less than a month, *the contract was, in reality, a month to month contract terminable by either side at the end of any of the short voyages.*" (Italics supplied)

The term "voyage" as applied to a fishing vessel was considered in *Medina v. Erickson*, (CA 9th 1955) 226 F.2d 475. In that case the plaintiff's intestate signed articles, p. 478:

"...for one or more trips...and back to a final port of discharge in the United States for a term of time not exceeding twelve calendar months."

A union contract provided that in the event a crew member became ill, he was entitled to a full share for that particular trip only. Plaintiff's intestate argued that the twelve-month period referred to in the articles was a stated period of employment. This court (after specifically rejecting a consideration of the union contract) held that the twelve-month period was a limitation upon the duration of the voyage and not a stated period of employment. In so doing, it took note of evidence to the effect that there was a custom of the industry at the Port of San Diego that seamen, including engineers, by signing such articles engage themselves only for one voyage. The court went on to reverse a holding of the trial court awarding to the plaintiff's intestate a sum equal to the intestate's share of the

catch for a second and third trip of the vessel.

It is significant to note that the articles signed by the intestate in that case expressly referred to "one or more trips."

The duration of a fishing "season" was considered in two opinions of this court.

The first arose out of an appeal from the case of *Vitco v. Joncich*, (DC S.D. Calif. 1955) 130 F. Supp. 945. From the trial court's decision appear the following facts:

In the fall of 1951, libelant, who had shipped many years as a fisherman-cook, was approached by respondent to "fish tuna" with respondent during the ensuing "season." Libelant then signed written articles to fish "for a term of time not exceeding twelve calendar months.

A union contract provided:

"For boats fishing tuna all-year-around, there shall be two tuna seasons within a year. One season shall commence on January 1st and end on the following June 30th, and the next tuna season shall commence on July 1st, and end on the following December 31st" (p. 952).

Libelant fell ill in late January and left the vessel. The trial court held that he was entitled to his share of the catch for the second half as well as the first half of the year saying at page 952:

"It was the practice for (respondent) to fish tuna 'all-year-around'. And when respondent Joncich proposed that libelant join the crew for the 1952 season, he mentioned 'next year'; he also mentioned

the possibility of libelant's share for the year being as much as \$10,000.00; and libelant's last previous engagement with respondent had been for the full tuna season during an entire year.

"Although the provisions of the collective-bargaining agreement dividing the season are valid, the circumstances in evidence at bar, including the fact that the articles specify a maximum period of twelve months, require the finding that libelant *was in fact employed for the full tuna fishing season of the calendar year* (Citations)".

In affirming the decision this court in *Joncich v. Vitco*, (CA 9th 1956) 234 F.2d 161, was presented with an argument to the effect that libelant should only have been awarded a share of the catch for the first half of the year. It rejected the contention and accepted the opinion of the trial judge.

The significance of the case just referred to is found in a contrast between its facts and those in *Luksich v. Misetich*, (CA 9th 1944) 140 Fed.2d 812. The facts of the original conversation are set forth in the opinion as follows:

"At a casual meeting he had expressed his willingness to fish with Misetich [respondent]; at a subsequent meeting Misetich had told him when to report to the boat for work on the tuna nets. According to libelant's testimony he had asked whether the fishing spoken of was for tuna and sardines and had received an affirmative answer. Misetich denied having made any mention of sardines before the beginning of the tuna voyage to Mexican waters. *However, he admitted that at the beginning of the tuna season in March it was customary to take on fishermen for both the tuna sea-*

son and the sardine season that followed." (p. 813)
(Italics supplied)

Subsequently, the parties executed signed articles for the contemplated voyage as one "to Mexican waters, Mexico, for one or more trips and return and such other ports and places in any part of the world as the Master may direct and back to a final port of discharge in the United States for a term of time not exceeding six calendar months" (p. 813).

Libelant suffered an injury in the course of the tuna voyage and contended that he was entitled to the share of the catch from both the tuna and sardine voyage. The trial court awarded him only damages for the tuna season. It based its holding on the shipping articles.

The court disagreed with the trial court and held that the shipping articles were not controlling because they were incomplete and oral evidence should have been admissible to supplement them. It affirmed the result arrived at by the trial court, however, with the words:

"But a consideration of the evidence leads unerringly to the conclusion that at the time libelant embarked upon the voyage during which he was injured, his agreement with Missetich related to the tuna season only, the result reached by the district court." (p. 815)

Of very considerable significance is the fact that the lower court found that the conversation between libelant and respondent involved only the tuna fishing season, but *respondent admitted that at the beginning of the tuna season it was customary to take on fisher-*

men for both the tuna and sardine season that followed. The contrast between the *Luksich* case, *supra*, and the case of *Vitco v. Joncich*, *supra*, is evident. In the *Vitco* case, the court found that the libelant was in fact hired for the entire year and that the splitting of the season into two halves with one terminating on June 30th was an arbitrary division.

In the *Luksich* case, on the other hand, the court determined that although it was customary for persons to be taken on for both seasons, no express agreement was reached between the parties with respect to the later season.

The contrast between the two cases brings into clear focus the basic rule that a master is only liable to a seaman for wages to the end of the period for which he is actually employed.

(D) There Is No Evidence That Appellee Was Hired for More Than the 1963 Crab Fishing Season

There are two crab fishing seasons each year. One starts in the early summer and runs until the late autumn or winter. The other starts in the late winter and lasts until mid-spring. Between these seasons the vessel returns from Alaskan waters to Seattle. It does so again at the end of the spring season (Tr. 180-182). Appellant Petersen stated the situation very simply as follows:

“Q. Now, what do you term to be or consider to be the crab season?

“A. From June or July to November or December. That is one season.

From January to April is the other season.” (Tr. 317)

Appellee was hired in June to fish for “the coming crab fishing season” (Finding IV, R. 33).

There is not a shred of evidence that the oral contract of employment committed appellee to work on the boat the following spring (of 1964). To the contrary is appellee’s version of the conversation:

“Q. What was the discussion?

“A. I asked Hendricks, Captain Hendricks, if there is a chance for me for the coming season, and Mr. Hendricks said ‘Yes’.” (Tr. 70)

When the boat returns to Seattle at the end of the fall season, a fisherman may leave the vessel or, if employment is offered to him, he may fish with the vessel during the following spring season. As appellant Petersen put it:

“When they come down in November, the crew have the opportunity to quit or stay with the boat. That is between the crew and the skipper.” (Tr. 23)

The facts here are strikingly similar to those in the case of *Vitco v. Joncich*, 130 F. Supp. 945, discussed in the previous subsection of this brief. There the trial court found that the libelant and respondent had discussed tuna season but not the sardine season, although the respondent conceded that many persons are hired for both. Inferentially, if libelant’s work had been satisfactory, and he and the master had been compatible he would (but for his illness) have remained on the vessel during the sardine season. This did not mean, however,

that he was entitled to a share of the sardine catch.

Similarly, in the case at bar, there is undisputed evidence that if appellee's work had been satisfactory to the master and he had wished to stay on the vessel, he would probably have had an opportunity to do so during the following spring season.

However, there was never any contract for his services as a fisherman during the following spring season. Hence, under the case authorities cited above he is not entitled to Haugen's share of the catch for that season. It follows that Conclusion of Law II providing:

"That as a direct and proximate result of respondent's breach and repudiation of the aforesaid contract, libelant sustained damages by way of lost earnings in the sum of \$13,127.22." (R. 35),

is erroneous.

Technically Conclusion of Law II is erroneous even without reference to the transcript of the testimony in the case. Finding of Fact IV provides that libelant was employed as a fisherman "for the coming crab fishing season to commence shortly thereafter." (R. 2). The pretrial order defined that season by stating among the admitted facts the following:

"The 1963 crab fishing season of the *F. V. Sea Star* lasted from June 22, 1963 to December 10, 1963." (R. 22)

Therefore, applying the rules of substantive law set forth in the preceding subsection of this brief, appellee should not be entitled to Haugen's share of the catch from the 1964 spring season.

(E) Evidence as to Haugen's Earnings in 1963 Season

Haugen's earnings on the "Sea Star" for the crab fishing season of 1963 came to \$10,744.61 (R. 22). Appellee during the same period earned the sum of \$1,644.31 from another source (R. 22). Subtracting the actual earnings of appellee from Haugen's earnings during that season leaves a difference of \$9,100.30.

If this court determines there is to be any damage award and it determines not to reduce damages in accordance with the arguments set forth under Specifications 6 and 7 above, the damages should then be reduced to \$9,100.30.

Specification 9

This specification reads as follows:

The trial court erred in denying appellants' post trial motions to dismiss the cause or to reduce the awards in accordance with the contentions set forth in Specifications 7 and 8 above, or for a new trial.

Appellants' arguments in behalf of this specification have already been set forth in the preceding sections of this brief. They are incorporated by reference herein.

CONCLUSION

In consideration, appellants contend that the trial court erred in not dismissing the case. Under the evidence as to custom and as to alternative methods of communication (which was uncontradicted), four of the findings of the trial court were in error. The trial court should have concluded that on the basis of the custom

in the industry and the circumstances facing Hendricks, Hendricks acted reasonably in sending the message to Petersen in the manner that he did. Therefore Conclusion of Law I to the effect that appellants breached their contract, is erroneous. An important portion or covenant of the contract had already been breached by appellee when he stated that he would not come to Alaska until "later the following week."

In the alternative, appellants contend that the damage award was incorrect. Here appellants make two alternative arguments:

1. The trial court's determination that appellee would have remained on the vessel at least as long as Haugen did is both unsupported by the evidence and speculative. Hence the award (if there is to be an award at all) should have been \$5,316.16.

2. Ordinary contract damages do not apply in the instance of a discharged seaman. He is entitled to wages to the end of the "season" for which he is hired. Under both the evidence and the trial court's findings, appellee was hired only for the 1963 season. Hence the award (if there is to be an award at all) should have been \$9,100.30.

Respectfully submitted,

FERGUSON & BURDELL

By: W. WESSELHOEFT

Proctors for Appellants

APPENDIX RE EXHIBITS

<i>Exhibit Number:</i>	<i>Identified</i>	<i>Admitted</i>
Libelant's Exhibit 1	63	63
Libelant's Exhibit 2 (discussed page 86, and withdrawn page 87 as unmarked)		
Libelant's Exhibit 2	244	246
Respondents' Exhibit A-1	276	283
" " A-2	276	283
" " A-3	282 (See 283)
" " A-4	320	400
" " A-5	379	381

CERTIFICATE

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing brief is in full compliance with these rules.

W. WESSELHOEFT
Proctor

No. 20306

In the

United States Court of Appeals

For the Ninth Circuit

NEAL CLARK,

Appellant,

vs.

STATE OF WASHINGTON, and WASHINGTON
STATE BAR ASSOCIATION, an agency of
State government,

Appellees.

THE STATE BAR OF CALIFORNIA,

Amicus Curiae.

Brief of Amicus Curiae

On Appeal from the United States District Court for the Western District of
Washington, Northern Division

FILED

FEB 11 1966

WM. B. LUCK, CLERK

McCUTCHEEN, DOYLE, BROWN,
TRAUTMAN & ENERSEN
MORRIS M. DOYLE
DAVID M. HEILBRON

601 California Street
San Francisco, California 94108

Attorneys for Amicus Curiae

SUBJECT INDEX

	Page
Jurisdiction	1
Statement of the Case.....	2
Argument	6
Summary of Argument	6
A. This Is a Collateral Attack Upon a State Court Judgment, and Therefore Cannot Be Maintained.....	7
1. The Judgment Cannot Be Attacked on the Ground That the Disbarment Proceedings Were a "Sham" or "Nullity"	9
2. The District Court's "Inherent Power to Control" Attorneys Admitted to Federal Practice Does Not Give It Power to Review a State Court Disbarment....	12
B. The Complaint Does Not State a Claim Under the Civil Rights Acts, the Statutes Upon Which It is Based	14
C. No Effective Decree Can Be Framed Against Appellees, Because Neither Has the Power to Admit Appellant or to Disbar Him.....	15
Conclusion	17

TABLE OF AUTHORITIES CITED

CASES	Pages
Agnew v. Moody, 330 F.2d 868 (9th Cir. 1964), <i>cert. den.</i> , 379 U.S. 867 (1965).....	5
Andrews v. Young, 21 C.A.2d 523, 69 P.2d 891 (1937).....	9
Angel v. Bullington, 330 U.S. 183 (1947).....	11
Bartlett v. Weimer, 268 F.2d 860 (7th Cir.), <i>cert. den.</i> , 361 U.S. 938 (1959)	5
Bell v. Hood, 327 U.S. 678 (1946).....	2
Biggs v. Ward, 212 F.2d 209 (7th Cir. 1954).....	12
Boundary County, Idaho v. Woldson, 144 F.2d 17 (9th Cir.), <i>cert. den.</i> , 324 U.S. 843 (1944).....	7
Byrne v. Kysar, 347 F.2d 734 (7th Cir. 1965).....	5
Caraker v. Webster, 24 C.A.2d 300, 74 P.2d 1048 (1938).....	8, 9
Cawley v. Warren, 216 F.2d 74 (7th Cir. 1954).....	5
Chandler v. Peketz, 297 U.S. 609 (1936).....	11
Chirillo v. Lehman, 38 F. Supp. 65 (S.D.N.Y.), <i>aff'd per</i> <i>curiam</i> , 312 U.S. 662 (1940).....	7
Chronicle Publishing Co. v. Superior Court, 54 Cal.2d 548, 354 P.2d 637 (1960).....	5
Covington Bridge Co. v. Hager, 203 U.S. 109 (1906).....	11
Daggs v. Klein, 169 F.2d 174 (9th Cir. 1948), <i>cert. den.</i> , 335 U.S. 908 (1949)	16, 17
Drawdy Investment Co. v. Leonard, 261 F.2d 226 (5th Cir. 1958)	8
Duncan v. Gegan, 101 U.S. 810 (1879).....	11
Duzynski v. Nosal, 324 F.2d 924 (7th Cir. 1963).....	5
Egan v. City of Aurora, 365 U.S. 514 (1961).....	14
Ensher v. Ensher, 238 A.C.A. 297, 47 Cal. Repr. 688 (Nov. 1965)	11
Ex Parte Garland, 71 U.S. 333 (1866).....	11, 12
Ex Parte Wall, 107 U.S. 265 (1882).....	4
Fishel v. Kite, 101 F.2d 685 (D.C. Cir. 1938), <i>cert. den.</i> , 306 U.S. 656 (1939).....	10

	Pages
Fisher v. New York, 312 F.2d 890 (2nd Cir.), <i>cert. den.</i> , 374 U.S. 828 (1963)	14
Fitts v. McGhee, 172 U.S. 516 (1899)	14
Gately v. Sutton, 310 F.2d 107 (10th Cir. 1962)	10, 11, 12, 13
Glasser v. Wessel, 152 F.2d 428 (2nd Cir.), <i>cert. den.</i> , 328 U.S. 839 (1945)	8
Grubb v. P.U.C., 281 U.S. 470 (1930)	7, 8
Hans v. Louisiana, 134 U.S. 1 (1889)	14
Harmon v. Superior Court, 329 F.2d 154 (9th Cir. 1964)	5
Harvey v. Sadler, 331 F.2d 387 (9th Cir. 1964)	2, 5, 15
Hewitt v. City of Jacksonville, 188 F.2d 423 (5th Cir.), <i>cert. den.</i> , 342 U.S. 835 (1951)	15
Hicks v. Los Angeles, 240 F.2d 495 (9th Cir. 1957)	8, 9
Hobbs v. Franklin Jewelry Co., 131 F.2d 432 (5th Cir. 1942)	8
Hodge v. Huff, 140 F.2d 686 (D.C. Cir.), <i>cert. den.</i> , 322 U.S. 733 (1944)	10
Holt v. Virginia, 381 U.S. 131 (1965)	13
In re Blake, 175 U.S. 114 (1899)	11, 12
In re Bruen, 102 Wash. 472, 172 Pac. 1152 (1918)	5, 15, 16
In re Clark, 61 W.2d 547, 379 P.2d 354 (1963), <i>cert. den.</i> , 375 U.S. 986 (1964)	2, 3, 4
In re Fletcher, 221 F.2d 477 (4th Cir.), <i>cert. den.</i> , 350 U.S. 867 (1955)	12
In re Hallinan, 43 Cal.2d 243, 272 P.2d 768 (1954)	4
In re MacNeil, 266 F.2d 167 (1st Cir.), <i>cert. den.</i> , 361 U.S. 861 (1959)	13
In re Simmons, 59 W.2d 689, 369 P.2d 947 (1962)	3, 5, 15, 16
Iselin v. La Coste, 147 F.2d 791 (5th Cir.), <i>cert. den.</i> , 321 U.S. 790 (1944)	11
Konigsberg v. State Bar, 353 U.S. 252 (1957)	13
Larsen v. Gibson, 267 F.2d 386 (9th Cir.), <i>cert. den.</i> , 361 U.S. 848 (1959)	5

	Pages
LeHigh Valley Ry. Co. v. Martin, 100 F.2d 139 (3rd Cir.), <i>cert. den.</i> , 306 U.S. 651 (1938).....	8
Longview Tugboat Co. v. Jameson, 218 F.2d 547 (9th Cir. 1955)	17
Lynch v. Bernal, 9 Wall. 315 (1869).....	10
Lyons v. Baker, 180 F.2d 893 (5th Cir.), <i>cert. den.</i> , 340 U.S. 828 (1950)	5
Manson v. Duncanson, 166 U.S. 533 (1897).....	10
Marchand v. Frellsen, 105 U.S. 423 (1881).....	11
Matter of Ballou, 48 W.2d 539, 295 P.2d 316 (1956).....	3
Miquel v. McCarl, 291 U.S. 442 (1934).....	11
Mitchell v. Greenough, 100 F.2d 184 (9th Cir. 1938), <i>cert.</i> <i>den.</i> , 306 U.S. 659 (1939).....	13
Monroe v. Pape, 365 U.S. 167 (1961).....	14
Mount Pleasant v. Beckwith, 100 U.S. 514 (1879).....	14
North Carolina v. Temple, 134 U.S. 22 (1889).....	14
Payne v. Fite, 184 F.2d 977 (5th Cir. 1950).....	17
Pena v. Hammond, 172 F.2d 312 (5th Cir. 1949).....	7
Pierson v. Ray, 352 F.2d 213 (5th Cir. 1965).....	5
Randall v. Brigham, 7 Wall. 523 (1868).....	12
Reynolds v. Sims, 377 U.S. 533 (1964).....	14
Rhodes v. Meyer, 334 F.2d 709 (8th Cir. 1964), <i>cert. den.</i> , 379 U.S. 915 (1965).....	5
Rooker v. Fidelity Trust, 263 U.S. 413 (1923).....	7
Saier v. State Bar of Michigan, 293 F.2d 756 (6th Cir.), <i>cert.</i> <i>den.</i> , 368 U.S. 947 (1961).....	4, 11, 13, 14
Santiago v. Noguerras, 214 U.S. 260 (1909).....	10
Sarelas v. Sheeham, 326 F.2d 490 (7th Cir. 1963), <i>cert. den.</i> , 377 U.S. 932 (1964).....	9, 10, 11
Schware v. Board of Examiners, 353 U.S. 232 (1957).....	13
Sellas v. Kirk, 200 F.2d 217 (9th Cir. 1952), <i>cert. den.</i> , 345 U.S. 940 (1953)	17

	Pages
Selling v. Radford, 243 U.S. 46 (1917).....	12, 13
Sires v. Cole, 320 F.2d 877 (9th Cir. 1963).....	5, 15
Stafford v. Superior Court, 272 F.2d 407 (9th Cir. 1959), <i>cert. den.</i> , 362 U.S. 979 (1960).....	10, 11
Theard v. United States, 354 U.S. 278, 77 S.Ct. 1274 (1957)....	1, 12
Wayside Transp Co. v. Marcell's Motor Express, Inc., 284 F. 2d 868 (1st Cir. 1960).....	8
Williams v. Fanning, 332 U.S. 490 (1947).....	16
Williams v. Tooke, 108 F.2d 758 (5th Cir.), <i>cert. den.</i> , 311 U.S. 655 (1940)	8
Williford v. People of California, 352 F.2d 474 (9th Cir. 1965)	15
Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963)	13
Wolcott v. Hutchins, 245 F. Supp. 578 (S.D.N.Y. 1965).....	9
Work v. Rives, 267 U.S. 175 (1925).....	11
Young v. Ragen, 337 U.S. 235 (1949).....	9

CONSTITUTIONS

United States Constitution :	
Eleventh Amendment	14

CODES

Calif. Bus. & Pro. Code § 6008.....	15
Calif. Bus. & Pro. Code § 6078-84.....	5
Calif. Bus. & Pro. Code § 6086.5.....	5
Wash. Rev. Code § 2.48.010.....	15
Wash. Rev. Code § 2.48.040.....	16
Wash. Rev. Code § 2.48.060.....	15

STATUTES	Pages
28 U.S.C.A. § 1291	2
28 U.S.C.A. § 1294	2
28 U.S.C.A. § 1343 (3)	1, 6, 14
28 U.S.C.A. § 1738	7
42 U.S.C.A. § 1983	1, 6, 14, 15
RULES	
Rules of Procedure of Calif. State Bar, Rules 34, 36, 38, 40....	5
Wash. Rules of Court, Rule 5.....	3
Wash. Rules of Court, Rule 7.....	3
Wash. Rules of Court, Rule 8.....	3
Wash. Rules of Court, Rule 8 D.....	3
Wash. Rules of Court, Rule 9.....	3
TEXTS	
114 A.L.R. 161	5
114 A.L.R. 168-72	15
I Freeman, Judgments, p. 629.....	9
I Freeman, Judgments, pp. 772-3.....	11
Hart & Wechsler, The Federal Courts and the Federal System, p. 829	14
Prosser, Torts, pp. 856-67.....	8

In the

United States Court of Appeals

For the Ninth Circuit

NEAL CLARK,

Appellant,

vs.

STATE OF WASHINGTON, and WASHINGTON
STATE BAR ASSOCIATION, an agency of
State government,

Appellees.

THE STATE BAR OF CALIFORNIA,

Amicus Curiae.

Brief of Amicus Curiae

On Appeal from the United States District Court for the Western District of
Washington, Northern Division

I.

JURISDICTION

Appellant contends that the District Court's jurisdiction was sustained by two Civil Rights Act, 42 U.S.C.A. § 1983 and 28 U.S.C.A. § 1343 (3) (O. Br. 1-2).*

*Appellant's opening brief will be referred to as "O. Br."

Appellant also claims that jurisdiction was "vested in the Federal Courts by virtue of their unquestioned inherent right of control of their attorney officers . . ." (O. Br. 2). *Theard v. United States*, 354 U.S. 278, 77 S.Ct. 1274 (1957) (O. Br. 7). Federal courts do have the power to "control" the attorneys who practice before them, but that does not mean they have the power to control those attorneys with respect to their practice before state courts. In fact, both state and federal courts have "autonomous" control over the attorneys who practice before them. *Theard v. United States*, *supra*. See pp. 12-13, *infra*.

There is some question whether the District Court lacked jurisdiction entirely, or whether it had jurisdiction to decide that the complaint did not state a cause of action. See *Bell v. Hood*, 327 U.S. 678 (1946); *Harvey v. Sadler*, 331 F.2d. 387 (9th Cir. 1964). Since the complaint plainly did not state a cause of action, the question of jurisdiction need not be decided. The District Court's judgment must be affirmed in either event.

Jurisdiction in this Court to review the District Court's judgment is sustained by 28 U.S.C.A. §§ 1291 and 1294, which give each court of appeals jurisdiction of appeals from judgments of district courts situated within its circuit.

II.

STATEMENT OF THE CASE

In March, 1961, the Washington State Bar Association ("Washington State Bar") served appellant with a disciplinary complaint. The complaint contained three counts. (*In re Clark*, 61 W.2d 547, 379 P.2d 354 (1963), *cert. den.*, 375 U.S. 986 (1964), Tr. 19).^{*} The first charged that appellant had secured a deed to property from a 95 year old, mentally ill lady upon a promise to support her for life, and that he did not keep his promise. The day after obtaining the deed he petitioned a court to appoint a guardian for the lady, alleging in the petition that she was incompetent. (61 W.2d at 548-50; Tr. 19-20)

The second count charged that appellant obtained public support for the lady by concealing his promise to support her from a county Department of Public Assistance (61 W.2d at 551; Tr. 20).

The third count charged that appellant conspired to extort funds from a former client by falsely accusing him of an extra-marital affair (61 F.2d at 551-52; Tr. 20-21).

^{*}The Clerk's transcript of record will be referred to as "Tr."

According to Washington law, hearings upon disciplinary complaints are held before a trial committee created by the Board of Governors of the Bar. Washington Rules of Court, Rules for Discipline of Attorneys, 5, 7, Tr. 38-9, 42-45 ("Rules Disc."). After the committee hears a matter, it makes findings and conclusions concerning it, and submits them, together with the record made before it and its recommendation as to discipline, to the Board of Governors (Rules Disc., 5, 8, Tr. 38-9, 45-47). Upon reviewing the record and recommendation, the Board makes its own findings and recommendation. If the recommendation is disbarment, as it was in this case, the record must be filed with the State Supreme Court (Rules Disc., 8 D, Tr. 47). After the matter is briefed, it is heard by the Court (Rules Disc., 9, Tr. 47-8). The power to disbar is "exclusively" in the Court, and the Board of Governors' recommendation as to discipline is "advisory only". *In re Simmons*, 59 W.2d 689, 369 P.2d 947, 956 (1962); *Matter of Ballou*, 48 W.2d 539, 295 P.2d 316, 318 (1956).

That procedure was followed in this case (O. Br. 3; Comp., Para. V, Tr. 2). A trial committee heard the case and found that all three counts of the disciplinary complaint were sustained. The Board of Governors reviewed that finding, and found that the first two counts were sustained, but that the third was not. It recommended disbarment. The Washington Supreme Court heard the matter, found that the same two charges were sustained, and entered judgment disbaring appellant. (O. Br. 3; Comp., Para. V, Tr. 2; *In re Clark*, *supra*, Tr. 18-22).

Subsequently, appellant petitioned the Supreme Court of the United States for certiorari, which was denied (Comp., Para. III, Tr. 1). Some ten months later, he filed this action.

It alleges that the proceedings leading to his disbarment were not "fair and impartial" (Comp., Para VIII, Tr. 5)* because the trial committee and the Board of Governors allegedly (1) did not hear two witnesses whom appellant thought they should have heard (Comp., Paras. V, VI, Tr. 3-4); (2) received evidence that he thought they should not have received (Comp., Para. VIII (1), (3), (4), Tr. 5-6); (3) conducted the hearing too long a time, and asked too many questions, "thereby rendering plaintiff's own counsel nearly mute" (Comp., Para. VIII (7);† (4) made an erroneous finding of fact (Comp., Para. VIII (5), Tr. 6; and (5) failed to follow some state procedural rules (Comp., Paras. VII, VIII (2), (6), (8), Tr. 4-7).

The action is brought under a Civil Rights Act enacted during Reconstruction (Comp., Para. I; O. Br. 1), and its theory apparently is that appellant was disbarred without "procedural due process" (O. Br. 5-7). It prays for a federal court injunction reinstating him to practice before the

*It also claims he was "subjected to cruel and unusual punishment." (O. Br. 6, 16). Of course defrauding both a 95 year old incompetent lady and a public agency, which the Washington Supreme Court found appellant to have done, involves moral turpitude, see e.g., *In re Clark, supra*, at 552; *In re Hallinan*, 43 Cal. 2d 243, 247-48, 272 P.2d 768 (1954), and cases cited in it. It is an ancient practice to disbar an attorney for committing acts involving moral turpitude, see e.g., *Ex Parte Wall*, 107 U.S. 265 (1882) (Cited at O. Br. 9); *Saier v. State Bar of Michigan*, 293 F.2d 756, 760, *cert. den.*, 368 U.S. 947 (1961). The claim that that practice is cruel and unusual is frivolous.

†According to appellant's calculations, his counsel asked 1,820 questions and the trial "committee's side" asked 2,995 (Tr. 54). At appellant's counsel's request (Transcript of Hearing Before Trial Committee, filed in District Court on May 17, 1965, Tab B, p. 34, lines 22-24), appellant made an opening statement to the trial committee which fills 28 pages of transcript (Tab B, pp. 36-64). The "Association's" Opening Statement fills 8 pages (Tab B, pp. 28-34).

courts of the State of Washington.* The District Court dismissed the complaint upon appellees' motions to dismiss under Rule 12, and this appeal followed (Tr. 77-82).

The disciplinary procedure provided by Washington law—hearing before a trial committee, review by the Board of Governors of the Bar, subsequent review by a State Supreme Court having exclusive power to impose discipline—is similar to that of many other states, see 114 A.L.R. 161, 168-72, including California. See California Bus. & Pro. Code §§ 6078-84, 6086.5; Rules of Procedure of Cal. State Bar, 34, 36, 38, 40. Because of that similarity and because this case questions the traditional authority of state bars and supreme courts to discipline attorneys in accordance with those procedures, The State Bar of California ("Cal-

*The complaint also prayed for damages, but appellant has dropped that claim (O. Br. 8). In any event, it clearly could not have been maintained. In conducting disciplinary proceedings the Washington State Bar acts as an "intermediary agent" of the Washington Supreme Court. *In re Simmons*, 59 W.2d 689, 369 P.2d 947, 954 (1962); *In re Bruen*, 102 Wash. 472, 172 Pac. 1152 (1918). Cf. *Chronicle Publishing Co. v. Superior Court*, 54 Cal. 2d 548, 354 P.2d 637 (1960). Since it acted as that court's agent in conducting the disbarment proceedings of which appellant complains, it has judicial, or quasi-judicial, immunity from an action for damages arising out of its conduct of those proceedings, including one brought under the Civil Rights Acts, and alleging that the proceedings deprived appellant of due process of law. *Duzynski v. Nosal*, 324 F.2d 924 (7th Cir. 1963); *Bartlett v. Weimer*, 268 F.2d 860, 872 (7th Cir. 1959), *cert. den.*, 361 U.S. 938 (1959); *Byrne v. Kysar*, 347 F.2d 734 (7th Cir. 1965); *Harvey v. Sadler*, 331 F.2d 387 (9th Cir. 1964); *Larsen v. Gibson*, 267 F.2d 386 (9th Cir. 1959), *cert. den.*, 361 U.S. 848 (1959); *Agnew v. Moody*, 330 F.2d 868 (9th Cir. 1964), *cert. den.*, 379 U.S. 867 (1965); *Harmon v. Superior Court*, 329 F.2d 154 (9th Cir. 1965); *Sires v. Cole*, 320 F.2d 877 (9th Cir. 1963); *Cawley v. Warren*, 216 F.2d 74 (7th Cir. 1954); *Lyons v. Baker*, 180 F.2d 893 (5th Cir. 1950), *cert. den.*, 340 U.S. 828 (1950); *Rhodes v. Meyer*, 334 F.2d 709 (8th Cir. 1964), *cert. den.*, 379 U.S. 915 (1965); *Pierson v. Ray*, 352 F.2d 213 (5th Cir. 1965).

Furthermore, appellant's action for damages could not have been maintained for some of the same reasons that the suit for injunction could not. See pp. 8, 14-15, *infra*.

ifornia State Bar”) has requested the parties to consent to its filing an amicus curiae brief in this Court, and they have kindly done so.* As amicus curiae, the California State Bar takes no position with respect to whether the fact findings of the trial committee in this case, or the decision of the Washington Supreme Court, were correct. Its position is that those proceedings cannot be attacked in this proceeding.

Federal district courts are not reviewing courts having power to reverse the judgments of state supreme courts imposing discipline upon the attorneys practicing before them. The California State Bar is concerned that, should this Court reverse the District Court’s decision and permit it to entertain this action, this Court will have clothed district courts with just that power, and as a consequence will have seriously impaired the orderly process by which state courts traditionally discipline their officers.

III.

ARGUMENT

Summary of Argument

This action constitutes a collateral attack upon a final state court judgment of disbarment and therefore cannot be maintained (Part III A, *infra*.)

The statutes under which the action is brought, 42 U.S.C.A. § 1983 and 28 U.S.C.A. § 1343 (3) are applicable only to “persons,” and neither the State nor the State Bar, which is a governmental agency of the State, is a person within the meaning of those statutes (Part III B, *infra*.)

Neither this Court nor the District Court could grant an injunction compelling appellees to admit appellant to practice or not to disbar him, which is the relief for which

*The consents are attached to the Notice of Appearance, filed on January 12, 1966.

appellant prays. The reason is that the Supreme Court of the State of Washington is the only body having the power to admit or disbar an attorney, and it is not before this Court (Part III C, *infra*.)

A. This Is a Collateral Attack Upon a State Court Judgment, and Therefore Cannot Be Maintained.

On February 29, 1963, the Supreme Court of Washington entered its order disbaring appellant. Appellant petitioned the Supreme Court of the United States for a writ of certiorari to review that judgment, but the petition was denied (Comp., Para. III, Tr. 1). Some months later, he filed this action. It prays for an injunction "requiring defendants to restore plaintiff to the list of active members of the Washington State Bar Association", and "vacating the Judgment of disbarment." (Comp., Prayer, Tr. 8).^{*} As such, it is "merely a collateral attack" upon that judgment, and cannot be maintained. *Pena v. Hammond*, 172 F.2d 312 (5th Cir. 1949); *Grubb v. P.U.C.*, 281 U.S. 470 (1930).

A state court judgment is entitled to full faith and credit, and cannot be collaterally attacked, in a federal court. 28 U.S.C.A. § 1738; *Rooker v. Fidelity Trust*, 263 U.S. 413 (1923); *Grubb v. P.U.C.*, 281 U.S. 470 (1930); *Boundary County, Idaho v. Woldson*, 144 F.2d 17 (9th Cir. 1944), *cert. den.*, 324 U.S. 843 (1944); *Chirillo v. Lehman*, 38 F. Supp. 65, 67, (S.D. N.Y. 1940), *aff'd per curiam*, 312 U.S. 662 (1940):

"The principle is established beyond contradiction that a judgment of a state court may not be reviewed by a bill of equity in a federal court."

^{*}The prayer asks, "in the alternative, that defendants proceeding be set aside." That alternative prayer is identical in substance to the prayer for an injunction "vacating the Judgment of disbarment."

That is true whether the grounds upon which the judgment is attacked were presented to the state court, as appellant's contentions apparently were in this case,* or whether they were not. *Grubb v. P.U.C.*, 281 U.S. 470 (1930); *Lehigh Valley Ry. Co. v. Martin*, 100 F.2d 139 (3rd Cir. 1938), *cert. den.*, 306 U.S. 651 (1938); *Hobbs v. Franklin Jewelry Co.*, 131 F.2d 432 (5th Cir. 1942).

It is also true where the ground upon which the state court judgment is attacked is, as in this case, that appellant was deprived of a hearing or of due process in the state proceedings. (Comp., Para. VIII, Tr. 5-7). *Hicks v. Los Angeles*, 240 F.2d 495 (9th Cir. 1957) (plaintiff complained state proceedings denied him a hearing); *Glasser v. Wessel*, 152 F.2d 428 (2nd Cir. 1945), *cert. den.*, 328 U.S. 839 (1945) (plaintiff complained state court's failure to grant continuance deprived him of due process); *Williams v. Tooke*, 108 F.2d 758 (5th Cir. 1940), *cert. den.*, 311 U.S. 655 (1940); *Drawdy Investment Co. v. Leonard*, 261 F.2d 226 (5th Cir. 1958). "Due process does not give parties the right to litigate the same question twice." *Wayside Transp. Co. v. Marcell's Motor Express, Inc.*, 284 F.2d 868, 871 (1st Cir. 1960).†

*There was a dissenting opinion in the State Supreme Court which appellant asserts to be "clear in holding that a fair and impartial trial was not received." (Comp., Para. VIII, Tr. 5). His brief refers to the "constitutional questions *alleged* in the State proceeding of disbarment." (Emphasis added) (O. Br. 14). Further, he petitioned for certiorari, presumably on the theory that the proceedings and the judgment presented a federal question. Evidently, therefore, his contention that the "trial" was unfair was before the Washington Supreme Court, and was presented in his petition for certiorari.

†The rule forbidding collateral attack is equally applicable to the damage claim which appellant has dropped. The reason is that an action for damages against a state agent, like the State Bar, whose efforts persuade a court, like the Washington Supreme Court, to enter judgment against plaintiff, or to convict him, in a prior case, necessarily entails a collateral attack upon that judgment or conviction. Prosser, *Torts*, pp. 856-67; *Caraker v. Webster*, 24

Appellant seems to argue, however, that the rule forbidding collateral attacks is not applicable to his case because (1) the disbarment proceedings were a "sham" and a "nullity," (O. Br. 9, 13) and (2) because federal courts have "inherent power and jurisdiction in the control of attorneys" admitted to practice before federal courts (O. Br. 7-8). Both those arguments are erroneous.*

1. THE JUDGMENT CANNOT BE ATTACKED ON THE GROUND THAT THE DISBARMENT PROCEEDINGS WERE A SHAM OR NULLITY.

Appellant says that the disbarment proceedings were a "sham" and a "nullity" "as defined" in *Sarelas v. Sheeham*, 326 F.2d 490 (7th Cir. 1963), *cert. den.*, 377 U.S. 932 (1964) (O. Br. 9, 13).

Sarelas held that a complaint charging a court appointed officer with having committed "errors and irregularities" in state court proceedings did not state a cause of action under the Civil Rights Acts. It also said that the situation is different "when the proceeding itself is a sham or nullity" and is conducted "with a purpose to deprive a person of property without due process of law." *Id.* at 491. It did not say what a "sham" or "nullity" is.

C.A.2d 300, 301, 74 P.2d 1048 (1938) (action for damages against officers whose charges resulted in Civil Service Commission's order discharging plaintiff civil servant); *Andrews v. Young*, 21 C.A.2d 523, 69 P.2d 891 (1937); *Wolcott v. Hutchins*, 245 F. Supp. 578 (S.D.N.Y. 1965). Cf. I Freeman, *Judgments*, p. 629 (5th Ed. 1925).

*Appellant also points out that "consideration of Federal constitutional rights in state proceedings is now mandatory," citing *Young v. Ragen*, 337 U.S. 235 (1949) (O. Br. 11). That is true, but it does not follow that a federal district court can entertain a collateral attack upon a final state court judgment based upon the theory that the proceedings leading to judgment deprived the plaintiff of procedural due process. It is in fact clear that a collateral attack cannot be maintained on that theory. See *Hicks v. Los Angeles*, 240 F.2d 495, 497 (9th Cir. 1957); cases cited at p. 8, *supra*.

Appellant does not allege that the disbarment proceedings were conducted "with a purpose to deprive . . . [him] of property without due process of law," and therefore one half of what *Sarelas* requires to make a "different situation" is missing. The other half is also missing; the improprieties appellant alleges took place in the proceedings were clearly mere "errors and irregularities," and did not convert those proceedings into a "sham" or "nullity," whatever those terms may mean.

The alleged improprieties are that the trial committee or the Board of Governors (1) excluded evidence they should have admitted; (2) admitted evidence they should have excluded; (3) conducted the hearing too long a time and thereby prevented appellant's counsel from asking everything he wanted to ask*; (4) made an erroneous finding of fact; and (5) failed to follow some state procedural rules. See p. 4, *supra*. Erroneous rulings as to the admission or exclusion of evidence, *Stafford v. Superior Court*, 272 F.2d 407, 409 (9th Cir. 1959), *cert. den.*, 362 U.S. 979 (1960); *Gately v. Sutton*, 310 F.2d 107 (1962); improper limitation upon counsel's interrogation, *Stafford v. Superior Court, supra*; the making of erroneous fact findings, *Lynch v. Bernal*, 9 Wall. 315 (1869); *Hodge v. Huff*, 140 F.2d 686 (D.C. Cir. 1944), *cert. den.*, 322 U.S. 733 (1944); *Manson v. Duncanson*, 166 U.S. 533, 545 (1897); and the failure to follow state procedural rules, *Santiago v. Nogueras*, 214 U.S. 260 (1909); *Fishel v. Kite*, 101 F.2d 685 (D.C. Cir. 1938), *cert. den.*, 306 U.S. 656 (1939), all are merely "errors and irregularities," and do not subject a judgment to collateral attack.† It makes no difference that

*According to appellant's calculation, his "side" asked 1,820 questions and the committee's asked 2,995 (Tr. 54). See p. 4, *supra*.

†It has been the rule "from time immemorial", and *Sarelas* merely restated it, that a judgment cannot be collaterally attacked for mere "errors and irregularities" in the proceedings leading to

the attack is based upon the Civil Rights Acts, *Stafford v. Superior Court*, *supra*, *Gately v. Sutton*, *supra*, *Sarelas v. Sheeham*, *supra*, or that the alleged errors amount to deprivation of procedural due process. See cases cited at p. 8 *supra*. See also *Stafford v. Superior Court*, *supra*.

Moreover, the Washington Supreme Court entered the judgment which disbarred appellant, not the Board of Governors or the trial committee, neither of which had the power to do so. See p. 3 *supra*. Appellant does not allege or claim that the Supreme Court's proceedings were a "sham" or a "nullity." Since he does not, and since it is that court's judgment which stands as a bar to this collateral attack, it is immaterial whether or not the proceedings in the committee or the Board were a "sham" or a "nullity." See *Saier v. State Bar of Michigan*, *supra*, 293 F.2d at 760. Cf. *Angel v. Bullington*, 330 U.S. 183 (1947); *Duncan v. Gegan*, 101 U.S. 810 (1879); *Ensher v. Ensher*, 238 A.C.A. 297, 47 Cal. Rep. 688 (1965).*

it. *Iselin v. La Coste*, 147 F.2d 791 (5th Cir.), *cert. den.*, 321 U.S. 790 (1944); *Chandler v. Peketz*, 297 U.S. 609, 612 (1936); *Marchand v. Frellsen*, 105 U.S. 423, 428-9 (1881); I Freeman, *Judgments*, pp. 772-3 (5th Ed. 1925).

*Appellant asks this Court in effect to order the Supreme Court of Washington to change its judgment. See p. 7, *supra*, p. 16, *infra*. A rule complementary to the rule prohibiting collateral attacks also prohibits this Court, or the District Court, from granting that relief. The power to admit or to disbar is a discretionary, in fact a judicial, power. *Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 378-9 (1866) (cited at O. Br. 16); *Saier v. State Bar of Michigan*, 293 F.2d 756, 760 (6th Cir.), *cert. den.*, 368 U.S. 947 (1961). Federal courts have no power to issue an injunction or a writ of mandate compelling a state (or a federal) agent to exercise a discretionary power in a given way. *In re Blake*, 175 U.S. 114, 117 (1899); *Work v. Rives*, 267 U.S. 175, 177-78 (1925); *Miquel v. McCarl*, 291 U.S. 442, 452 (1934); *Covington Bridge Co. v. Hager*, 203 U.S. 109, 111 (1906). In particular, they have no power to issue an injunction or writ of mandate compelling a state court to decide to dis-

2. THE DISTRICT COURT'S "INHERENT POWER TO CONTROL" ATTORNEYS ADMITTED TO FEDERAL PRACTICE DOES NOT GIVE IT POWER TO REVIEW A STATE COURT DISBARMENT.

Appellant claims (O. Br. 7, 8) that *Theard v. United States*, 354 U.S. 278 (1957) and *Selling v. Radford*, 243 U.S. 46 (1917) stand for the proposition that a federal court has "inherent powers to protect the capacity and independency of its own officers (Federally Registered Attorneys) from unconstitutional . . . State interference. . . ."*

Actually, *Theard* and *Selling* hold that a federal court is not bound to disbar an attorney from practice before it simply because the court of the state in which the district court sits has disbarred him. They do not hold that a state court disbarment order may be reviewed or reversed in a federal court. In fact, they hold precisely the reverse.

Recognizing that "the authority of the court over its attorneys and counselors is of the highest importance," *Randall v. Brigham*, 7 Wallace 523, 540 (1868), in *Theard* the Court said that state courts "have autonomous control over the conduct of their officers, among whom . . . lawyers are included," *Theard v. United States, supra*, at 281, and in *Selling* it said it had "no authority to re-examine or reverse as a reviewing court the action of the Supreme Court . . . [of a state] in disbaring a member of the bar of the courts of that state for personal and professional misconduct." *Selling v. Radford*, 243 U.S. 46, 50 (1917) (cited at O. Br.

cipline an attorney in one way rather than another, or to change or reverse a decision as to discipline. See *Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 379 (1866); *Gately v. Sutton*, 310 F.2d 107, 108 (10th Cir. 1962); *Biggs v. Ward*, 212 F.2d 209 (7th Cir. 1954). The power to compel those things, and the function of doing so, is, if anywhere, in reviewing courts, and an action to compel a state court to reverse a decision cannot be used as a substitute for review of a state court judgment. *In re Blake, supra*.

*Appellant also cites *In re Fletcher*, 221 F.2d 477 (4th Cir.), *cert. den.*, 350 U.S. 867 (1955) for the same proposition (O. Br. 8). *Fletcher* held a state court disbarment to be "good cause" for federal court disbarment.

12). Following *Selling*, the Tenth Circuit recently held that federal courts have no "jurisdiction" to entertain a suit brought by a disbarred attorney under the Civil Rights Acts to set aside a state court disbarment order. *Gately v. Sutton*, 310 F.2d 107, 108 (10th Cir. 1962):

"The federal courts do not have jurisdiction to review an order of the Colorado Court disbarring an attorney in that state for personal and professional misconduct. . . .

"The limits of [federal] review . . . are violations, in the course of disbarment proceedings, of the due process or equal protection clauses of the Fourteenth Amendment, and a petition for a writ of certiorari to the Supreme Court of the United States is the only method by which review may be had." 310 F.2d at 108.*

See also *In re MacNeil*, 266 F.2d 167 (1st Cir. 1959), *cert. den.*, 361 U.S. 861 (1959); *Saier v. State Bar of Michigan*,

*In rare cases the Supreme Court has reviewed on certiorari a final order of a state supreme court respecting an attorney's right to practice law in the state, but never upon collateral attack. In each of the Supreme Court cases relied upon by appellant, for example, *Konigsberg v. State Bar*, 353 U.S. 252 (1957) (O. Br. 9); *Schware v. Board of Examiners*, 353 U.S. 232 (1957) (O. Br. 9) and *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963) (O. Br. 7, 9, 12), the Supreme Court reviewed orders of a state supreme court refusing an attorney's application for admission to practice; each went directly from the state court to the Supreme Court on certiorari. Similarly, in *Holt v. Virginia*, 381 U.S. 131 (1965) (O. Br. 13-14) the Court reviewed an attorney's contempt conviction on certiorari to the State Supreme Court.

The statement that a "legal license" is a "constitutionally protected right" (O. Br. 9) is therefore true in the sense that the Supreme Court will review, on certiorari, state court proceedings concerning the "license." Nevertheless, "the right to practice law in the state court has been held by the Supreme Court not to be a privilege granted by the Federal Constitution," or protected by it, see *Mitchell v. Greenough*, 100 F.2d 184, 185 (9th Cir. 1938), *cert. den.*, 306 U.S. 659 (1939), a holding which indicates the autonomy traditionally accorded State control of attorneys practicing before state courts.

293 F.2d 756, 760 (6th Cir. 1961), *cert. den.*, 368 U.S. 947 (1961).

B. The Complaint Does Not State a Claim Under the Civil Rights Acts, the Statutes Upon Which It Is Based.

The Civil Rights Act under which this action is brought, 42 U.S.C.A. § 1983,* provides that the "person" who does the things it proscribes shall be liable to the people injured by his actions.

A municipality is not a "person" within the meaning of that statute, and therefore no action based upon it will lie against a municipality. *Monroe v. Pape*, 365 U.S. 167, 187-92 (1961); *Egan v. City of Aurora*, 365 U.S. 514 (1961); *Fisher v. New York*, 312 F.2d 890 (2nd Cir. 1963), *cert. den.*, 374 U.S. 828 (1963). The reason is that cities "have been traditionally regarded as subordinate governmental instrumentalities created by the state to assist in the carrying out of state governmental functions," *Reynolds v. Sims*, 377 U.S. 533, 575 (1964); *Mount Pleasant v. Beckwith*, 100 U.S. 514, 529 (1879), and the 1871 Congress, which enacted the Civil Rights Act, decided not to impose obligations upon a "mere instrumentality for the administration of state law." *Monroe v. Pape*, 365 U.S. 167, 190 (1961).† For

*The complaint is based upon two Civil Rights Acts statutes, 42 U.S.C.A. § 1983 and 28 U.S.C.A. § 1343 (3) (see Tr. 1). Both came from the 1871 Civil Rights Act. Section 1983 imposes liability and § 1343 (3) is its "parallel jurisdictional" provision. See Hart & Wechsler, *The Federal Courts and The Federal System*, p. 829.

†The Congressional Globe indicates that Congress doubted that it had such power. Cong. Globe, 42nd Cong., 1st Sess. 804, 820-21. In view of the Eleventh Amendment, which prohibits federal courts from entertaining suits against a state by citizens of another state, its doubt was well warranted. The Amendment has been construed to prohibit suits (like this one) against a state by citizens of the same state, as well. See *Hans v. Louisiana*, 134 U.S. 1 (1889); *Fitts v. McGhee*, 172 U.S. 516, 524-25 (1899); *North Carolina v. Temple*, 134 U.S. 22 (1889).

the same reason, neither a state or a county, *Sires v. Cole*, 320 F.2d 877 (9th Cir. 1963), or a school district, *Harvey v. Sadler*, 331 F.2d 387 (9th Cir. 1964), or any governmental subdivision of a state, *Hewitt v. City of Jacksonville*, 188 F.2d 423 (5th Cir. 1951), *cert. den.*, 342 U.S. 835 (1951); *Williford v. People of California*, 352 F.2d 474, 476 (9th Cir. 1965) is a person within the meaning of the Civil Rights Acts.

The Washington State Bar is "an agency of the state," Wash. Rev. Code 2.48.010, and is sued as such. (Comp., Tr. 1; O. Br. 1) Its Board of Governors has power, subject to the approval of the State Supreme Court, to fix qualifications for admission to practice, to establish rules of professional conduct, and to hear "causes involving discipline." Wash. Rev. Code § 2.48.060. In hearing those causes, it acts as an agent of the State Supreme Court. *In re Simmons*, 59 W.2d 689, 369 P.2d 947, 954 (1962); *In re Bruen*, 102 Wash. 472, 172 Pac. 1152 (1918). Like most state bars, therefore, it is apparently a "governmental body" in the "judicial department" of State government. 114 A.L.R. 161. See, e.g., Calif. Bus. & Pro. Code, §6008.

As such, and like a municipality, a county or a school district, it is an "instrumentality for the administration of state law." Accordingly, it is not a person within the meaning of the Civil Rights Act, 42 U.S.C.A. § 1983, and cannot be sued under it. Of course, the State itself cannot be sued under it either. See *Williford v. People of California*, 352 F.2d 474, 476 (9th Cir. 1965); *Sires v. Cole*, *supra*.

C. No Effective Decree Can Be Framed Against Appellees, Because Neither Has the Power to Admit Appellant or to Disbar Him.

Appellant seeks an injunction "vacating the Judgment of disbarment" and "requiring defendants to restore plain-

tiff to the list of active members of the Washington State Bar Association." (Comp., Prayer, Tr. 8) see p. 7, *supra*.

The Washington State Bar had power to and did recommend to the Washington Supreme Court that it disbar appellant, Rev. Code Wash., 2.48.040, but it had no power to and did not disbar him. That power, together with the power to "admit and enroll attorneys in the State of Washington," is exclusively in the Washington Supreme Court. *In re Bruen*, 102 Wash. 472, 172 Pac. 1152, 1153 (1918); *In re Simmons*, 59 W.2d 689, 369 P.2d 947 (1962).

Since the Washington State Bar does not have the power to do the things which appellant asked the District Court to require it to do, and since only the Washington Supreme Court, which is not a party to this action, does have that power, the injunction prayed for cannot be granted and the action must be dismissed. *Williams v. Fanning*, 332 U.S. 490, 493 (1947).

In *Daggs v. Klein*, 169 F.2d 174 (9th Cir. 1948), *cert. den.*, 335 U.S. 908 (1949), for example, the Secretary of the Navy discharged plaintiff civil servants from employment at a naval base. The relevant statute vested authority to discharge, and to restore to employment, in the Secretary. Plaintiffs brought suit against the base commander praying "for an order that they be reinstated to their former employment." *Id.*, at 175-76. This Court affirmed the trial court's order dismissing the action, and said:

"Applying [the] formula [of *Williams v. Fanning*] to the instant case the query is: Who would be required to act by a decree granting the relief which appellants seek? The answer is found in relating the character of the relief sought to the applicable law. First, appellants ask reinstatement. Question: To whom does the statute delegate the power to reinstate under the circumstances? Answer: To the Secretary.

* * *

“ . . . [I]n the absence of the Secretary of the Navy no decree can be entered ‘which will grant the relief desired by expending itself on the subordinate official who is before the Court.’ ” 169 F.2d at 176

Accord, *Sellas v. Kirk*, 200 F.2d 217 (9th Cir. 1952), *cert. den.*, 345 U.S. 940 (1953); *Payne v. Fite*, 184 F.2d 977 (5th Cir. 1950); *Longview Tugboat Co. v. Jameson*, 218 F.2d 547 (9th Cir. 1955).

CONCLUSION

State courts have autonomous control over the discipline of the attorneys who practice before them, and that has been the rule in this country since its beginning. On rare occasions, a state court judgment of disbarment, like other state court judgments, has been reviewed by the Supreme Court of the United States on certiorari. The availability of that means of review represents a careful accommodation between the principles of federalism and the principle that State Courts must have the power to control the conduct of the attorneys who practice before them. Such review was sought by appellant in this case, for he petitioned for certiorari, which was denied. That is the end of the matter, and it should be. District courts are not reviewing courts, and in particular they are not reviewing courts having power to reverse the judgments of state supreme courts imposing discipline upon the attorneys who practice before them. No court has ever held that they are. The District Court's judgment should be affirmed.

Respectfully submitted,

McCUTCHEN, DOYLE, BROWN,
TRAUTMAN & ENERSEN
MORRIS M. DOYLE
DAVID M. HEILBRON

601 California Street
San Francisco, California 94108

Attorneys for Amicus Curiae

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MORRIS M. DOYLE

NO. 20306

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

NEAL CLARK,
Appellant

vs.

STATE OF WASHINGTON,

WASHINGTON STATE BAR ASSOCIATION,
Appellees

NO. 20306

Appeal from the United States District Court
for the Western District of Washington,
Northern Division

Honorable W. T. Beeks, Judge

Brief of Appellee Washington State Bar
Association

T. M. Royce
Attorney for Appellee
Washington State Bar Association

Address:
31st Floor Smith Tower
Seattle, Washington

FILED

FEB 11 1960

U.S. DIST. COURT

Bradley v. Fisher, 80 U.S. (13 Wall) 335 ..	
20 Law Ed. 646	37
Caffrey, In re (1963) 63 Wn 2d 1, at 4,	
385 Pac. 2d 383	10
Chambers v. Florida, 309 U.S. 227, 84 Law Ed. 716,	
60 S. Ct. 473	34
Clark, In re, 61 Wn 2d 547, 379 Pac. 2d 354;	
cert. denied 375 U. S. 986, 11 L. Ed 2d 472,	
84 S. Ct. 519; rehearing denied 376 U.S. 935,	
11 Law Ed. 2d 655, 84 S. Ct. 698 (1964)	2, 12, 13
Emmons v. Smitt, 58 Fed. Supp. (1944) 869 at 872, 873	13
Emmons v. Smitt, 6 C.A. (1945) 149 Fed. 669 at 670	32
Fletcher, In re (1965) 4th C.A. 221 Fed. 2d 477 ..	37
Gately v. Sutton (1962) 10 C.A. 310 Fed. 2d 107 ..	28-30
Gray v. Wilson (Nor. Dist. Cal. 1964) 230 Fed.	
230 Fed. Supp. 860	36
Greene v. McElroy, 360 U.S. 474, 79 S. Ct. 1400,	
3 Law Ed. 2d 1531	35
Holt v. Virginia (1965) 14 Law Ed. No. 3, P. 220..	34
Konigsberg v. California (1957) 353 U.S. 252,	
77 S. Ct. 722; 1 Law Ed. 2d 810	34
Mitchell v. Greenough, 9 C.A. (1938)	
100 Fed. 2d 184 at 185	31
Rooker v. Fidelity Trust Co. (1923) 263 U.S. 413,	
44 S. Ct. 149, 68 Law Ed. 362	28
Sarelas v. Sheehan (1963) 7th C.A. 326 Fed. 2d 490,	20, 21, 38
Sware v. Board (1957) 353 U.S. 233,	
77 S. Ct. 752, 1 Law Ed 2d 796	34
Sires v. Cole (1963) 9 C.A. 320 Fed. 2d 877	25-26, 30-31
Secombe, Ex parte (1857) 60 U.S. (19 How.)	
9, at 15, 15 Law Ed. 565	26-27
Selling v. Radford (1917) 243 U.S. 46,	
37 S. Ct. 377, 61 Law Ed. 585	27 and 37
Theard v. U.S. (1957) 354 U. S. 278,	
77 S. Ct. 1274, 1 Law Ed. 2d 1342	35
Wall, Ex parte, (1883) 107 U. S. 265,	
2 S. Ct. 561, 27 Law Ed 552	36
Willner v. Committee on Character and Fitness,	
373 U. S. 96, 83 S. Ct. 1175, 10 Law Ed 2d 224..	34
Young v. Rage, 337 U. S. 235, 93 Law Ed. 1333,	
69 S. Ct. 1073	34-35

STATUTES

	Page
Section 1383, Title 28 U.S.C.	1, 21, 24
Section 1983, Title 42 U.S.C. (R.S. 1979).....	1, 11, 22, 25, 30, 32
Mar. 3, 1911, 36 Stat. 1087, 1092	22, 23
June 25, 1948, 62 Stat. 932	23, 24
Sept. 3, 1954, 68 Stat. 1341	24
Sept. 9, 1957, 71 Stat. 637	24
R.C.W. 2.48.010, Laws Wn 1933, p. 397, App. 1...	4 and 7
R.C.W. 2.48.030, Laws Wn 1933, p. 398, App. 1...	7
R.C.W. 2.48.060, Laws Wn 1933, P. 399, App. 1i..	4 and 8

RULES

Rule on Appeal No. 18, 9th C.A. Title 28 U.S.C....	2
----------------------------------------------------	---

RULES OF PROCEDURE IN
DISCIPLINARY PROCEEDINGS

V-C HEARING PANEL, 57 Wn 2d 11, R. 38, App. 111...	8
VIII-I WITNESS, 57 Wn 2d 1v11, R. 43, App. 111...	9
VIII-D DUTIES OF PANEL, 57 Wn 2d 111, R. 39, App. 111	9
VIII-A NOTICE OF RECOMMENDATION OF PANEL, 57 Wn 2d 1x1, R. 45, App. 111	9
VIII-B STATEMENT IN SUPPORT OR OPPOSITION, 57 Wn 2d 1x1, R. 46, App. 1v	9
VIII-C ADDITIONAL HEARING, 57 Wn 2d 1xi, R. 46, App. 1v.....	9
VIII-D BOARD REVIEW, 57 Wn 2d 1xi1, R. 46-47, App. 1v and v.....	4, 8, 10, 20
IX ARGUMENT IN SUPREME COURT, 57 Wn 2d 1xiv, R. 47, App. vi	10

The underscoring throughout this brief is the appellee's.

UNITED STATES COURT OF APPEALS
For the Ninth Circuit

NEAL CLARK,
Appellant,

vs.

STATE OF WASHINGTON and
WASHINGTON STATE BAR ASSOCIATION,
an agency of state government,
Appellees.

NO. 20306

Appeal from the United States District Court for
the Western District of Washington, Northern Division.

Honorable W. T. Beeks, Judge

BRIEF OF APPELLEE WASHINGTON STATE BAR ASSOCIATION

Statement of the Pleadings and Facts

THE PLEADINGS

This is an appeal from an order which dismissed
appellant's action for the reason 1) the court lacks
jurisdiction over the persons of the appellees and the
subject matter of the action, and 2) the complaint
fails to state a claim against either defendant upon
which relief can be granted. (R.77)

Jurisdiction of the U. S. District Court is
asserted by appellant to come from Articles (of
amendment) IV, VIII, and XIV of the United States
Constitution and from section 1343, title 28, and
section 1983, title 42, U.S.C.A. (R. 1)

Appellant's brief does not disclose the basis upon which he contends that this court has jurisdiction to review the order in question. He has not complied with Rule 18, 2 (b) in that particular.

"18. BRIEFS 1. *****

"2. This (appellant's) brief shall contain, in order here stated-- * * * *

"(b) A statement of the pleadings and facts disclosing the basis upon which it is contended that the District Court had jurisdiction and that this court has jurisdiction to review the judgment, decree or order in question. The statement shall refer distinctly (1) to the statutory provisions believed to sustain the jurisdictions, ***** (3) to the pleading necessary to show the existence of the jurisdictions, referring to the pages of the record in which they appear." 28 U.S.C. Pocket Part, p. 115; 28 FCA, Rules, p. 348.

Appellant's complaint (R. 1-10) states that he was unjustly disbarred by the Supreme Court of Washington in February 1963. In re Clark, 61 Wn 2d 547, 379 Pac. 2d 354; cert. denied 375 U.S. 986, 11 L. ed 2d 473, 84 S. Ct. 519; rehearing denied 376 U.S. 935, 11 L. ed. 2d 655, 84 S. Ct. 698 (1964). His claim is he was denied due process (R. 3, 5-7) in the proceedings which lead to the decision of the

Supreme Court, and that his disbarment is cruel and unusual punishment (R. 7), and a denial of the equal protection of the laws. R. 4.

His complaint asks the U. S. District court to vacate the state court's judgment disbarring him from the practice of law, and to grant him an injunction prohibiting appellees from revoking his license to practice law, and to order appellees to restore him to the list of active members of the Washington State Bar Association and to award him judgment for damages at \$12,000 a year from the date of his disbarment; or, in the alternative, "defendants' proceedings be set aside and plaintiff be tried in accordance with law." R. 8.

Appellees filed separate motions to dismiss the action on the grounds that the complaint failed to state a claim upon which relief could be granted, and because it appeared upon the face of the complaint the court lacked jurisdiction of the subject matter and of the appellees. R. 11, and 74. After argument and consideration of briefs, the court granted the motion on all the grounds. R. 77.

Appellant's complaint sets out the following as being the facts: That the Washington State Bar Association was created by act of the legislature. R. 1, line 12. RCW 2.48.010. (Laws 1933, chap. 94, p. 397) That the Association has authority over the discipline of attorneys. (R. 1 line 12)

That a formal complaint was filed by the Association which charged appellant with three items of professional misconduct. R. 2, lines 3, 23, 25. That a hearing was had before a three member panel. R. 2, lines 5, 30. That the panel made findings adverse to appellant as to the three items and recommended to the Board of Governors that he be disbarred. R. 2, line 30, R. 3, line 1.

(Note: this would be a recommendation that the Board itself make such a recommendation to the Supreme Court, for only the Supreme Court has power to disbar. RCW.2.48.060; Laws 1933, ch. 94, sec. 8, p. 399. App. 11; Rule VIII D, 57 Wn 2d 1x11, R. 46-47, App. v.)

That the Board of Governors on review of the record found that the facts sustained the first two items of complaint. R. 2, lines 1, 2. That the recommendation of the Board to the Supreme Court was that appellant be disbarred on account of the facts of the first two items, and that the third item be dismissed. R. 3, lines 2-6. That the Supreme court concurred in the findings of the Board, and approved the recommendation that the third item be dismissed and that Mr. Clark be disbarred for the misconduct shown in the remaining two items. R. 3, lines 7-8.

Violation of U. S. Constitutional provisions is alleged to consist mostly concerning the item which was dismissed. As to the other two items the violation of the constitution is claimed to be

1) the institution of these items of complaint by a petition and letter from a hostile, opposing attorney (R. 5, line 16)

2) the introduction in evidence of an oral decision made by the trial judge in the civil action involving the acts set out in these two items of complaint (R. 5, lines 19-22)

3) there was no prior interview of appellant before the formal disciplinary complaint was filed (R. 5, line 23)

4) there was no pretrial administrative hearing (R. 5, line 26)

5) a finding adverse to appellant was based on evidence given in his defense (R. 5, line 29; R. 6, lines 1-8)

6) there was hostile interrogation of appellant by panel members, so much so that appellant's own counsel was rendered nearly mute (R. 7, lines 1 to 7)

7) there was a failure to recognize appellant's claim to compensation for services rendered (R. 7, lines 8 to 21)

8) the Board refused to receive the testimony of Donna Teal (R. 4, lines 11 to 22; R. 10).

(See also appellant's brief p. 5 and 6)

As to the third item, the one that was dismissed, his chief claim is that he was not allowed by either the hearing panel or the Board of Governors to produce Ruth Meacham as a witness. R. 3, lines 10 to 21, R. 4, lines 1 to 9. And as to this third item he also complains his constitutional right was violated because the record as to that item was sent to the Supreme Court, contrary to a rule of discipline. R. 6, lines 21 to 28.

THE RULES OF PROCEDURE IN
DISCIPLINARY PROCEEDINGS

Mr. Clark was admitted to the practice of law by the Washington Supreme Court. R. page 1, line 17.

The Washington State Bar Association was created by the Legislature, as a state agency. RCW 2.48.010, Laws 1933, chap. 94, page 397, App. 1.

The statute provides that the Association shall be managed by a Board of Governors, one chosen from each Congressional District; there are seven. The Board elects the President, who is also a member of the Board. RCW 2.48.030 and 040, Laws 1933, chap. 94 page 398, App. 1.

As is authorized by the statute, RCW 2.48.060, Laws 1933, chap. 94, page 399, the procedure relating to the discipline of attorneys is established by rules of the Supreme Court. 57 Wn 2d xlvi to lxvii, R. 33 to 50. RCW 2.48.060; Laws 1933, chap. 94, sec. 8, page 399, App. ii.

Under these rules, neither the Board of Governors nor any committee has the power or authority to suspend or disbar any attorney. In situations where it is considered that the discipline should be either suspension or disbarment, all they may do is to make recommendation. Rule VIII D, 57 Wn 2d lxii, R. 47, App. v.

All formal disciplinary complaints are heard by a three member panel. The chairman is a member of the Board of Governors who resides in a district different from that of the lawyer concerned. The other members of the panel are lawyers who do reside in his county or district. Rule V, C, 57 Wn 2d li, R. 38, App. iii.

Testimony at the panel hearings is required to be under oath. Rule VII, I, 57 Wn 2d lvii, R. 43, App. iii. The panel makes findings of fact, conclusions and its recommendation of disposition to the Board of Governors. Rule V, D, 57 Wn 2d lli, R. 39, App. iii.

A copy of the findings, conclusions and recommendation of the panel is required to be served on the respondent lawyer. Rule VIII, A, 57 Wn 2d lxi, R. 45, App. iii. He has 20 days in which to make a statement in support of or in opposition to the panel report. Rule VIII, B, 57 Wn 2d lxi, R. 46, App. iv.

The respondent attorney has the right to request an additional hearing before the panel based on the ground of additional evidence, provided there is furnished a complete outline of such additional evidence and a statement of the reasons why the same was not presented at the hearing, all supported by affidavit. Such request may be granted or denied in the discretion of the Board. Rule VIII, C, . 57 Wn 2d lxi, R. 46, App. iv.

The record is required to be circulated to each member of the Board of Governors. Rule VIII, D (first and last paragraphs), 57 Wn 2d 1xii, R. 46-47, App. iv. This record includes a transcript of the testimony and the exhibits. Each member of the Board reads the entire record. When this is done, the Board in meeting makes its findings of fact, conclusions and its recommendation of disposition. Rule VIII, D, 57 Wn 2d 1xii, R. 46-47, App. iv.

The entire record is sent to the Supreme Court, with the Board's findings, conclusions and recommendation. Rule VIII, D, 57 Wn 2d 1xiii, R. 47, App. v. After briefs are filed, argument to the court is received. Rule IX, 57, Wn 2d 1xiv, R. 47, App. vi.

The Supreme Court makes its own findings of fact.

"Although the findings of the hearing panel and the Board of Governors are entitled to due weight, we are not bound by them since the power over disciplinary proceedings is vested solely in this court. In re Simmons, 59 Wn (2d) 689, 369 P. (2d) 947 (1962) and cases cited therein."

In re Caffrey (1963) 63 Wn 2d 1, at 4,
385 P. (2d) 383.

SUMMARY OF ARGUMENT

I. The complaint does not state a claim for which relief may be granted.

Although appellant's complaint characterizes, as violative of his constitutional rights, the factual situations he describes in his complaint, the facts he sets up show that his complaint is not that his constitutional rights are violated, but only that he disagrees with the state Supreme Court as to its conclusions drawn from the facts, and as to its interpretation of rules.

II. The United States District Court is without jurisdiction.

- 1) The Washington State Bar Association is not a "person" within the meaning of Sec. 1983, Tit. 42, U.S.C.A., on which appellant relies;
- 2) Appeal is the only remedy for errors such as those which he asserts;
- 3) The Association is immune from such a suit as appellant's, because it acted in a quasi-judicial capacity;

- 4) The practice of law is not a right guaranteed by the U. S. Constitution.

III. The authorities cited by appellant do not sustain the jurisdiction of the court.

ARGUMENT IN SUPPORT OF THE
ORDER OF DISMISSAL

The Complaint Does Not State a Claim For
Which Relief Can Be Granted

The decision of the Supreme Court in Mr. Clark's case is referred to in his complaint, and is part of the record here. R. 18 to 22. It will be clarifying to set out here the statement the court which epitomized the grounds for Mr. Clark's disbarment:

"With reference to count 1, while acting in his fiduciary capacity as attorney for his client, (Della J. Harper), who was 95 years of age and incompetent to transact business, Neal Clark, being aware of these facts, took from her a deed to her residence property, in consideration of his promise to provide for her as Fred Schmidt had previously done, and to furnish burial in conformity with her station in life. From the inception of this agreement, he successfully made her dependent upon public assistance, in total disregard of his contract to provide for her from his personal funds. None of his resources were expended for the care, support or burial of Della J. Harper. * * * *

CLAIM NOT STATED

"With reference to Count 2, Neal Clark knowingly falsified the applications for public assistance, when he stated that Della J. Harper was an indigent person. When the November 4th application was made, Fred Schmidt, although in a hospital, was still obligated to support her, and, when the December 4th application was made, Clark had obligated himself to continue Schmidt's previous agreement. The fact that he later inventoried the residence property in the guardianship estate did not correct the false statements in the applications for public assistance. As a matter of fact, he recorded the deed and wrongfully contended that the consideration had been paid in full. * * * *"

In re Clark, (1962) 61 Wn 2d 547, at 554, 555.

(It is practically made "mandatory" by the complaint that in considering it the court examine, even on motion to dismiss, the opinion of the Supreme Court. Emmons v. Smitt, 58 Fed. Supp. (1944) 869, at 872-783.)

The claim of lack of due process is the basis of appellant's complaint. He uses the term "lack of due process" repeatedly to characterize the various matters of which he complains. Examination of his allegations of fact demonstrates that the matters of which he complains are not lack of due process at all,

CLAIM NOT STATED

but are, instead, only his disagreement with the State Supreme Court as to the conclusions to be drawn from the facts, and its interpretation of rules. In short, his complaint is that the court made wrong decisions, not that there was lack of due process in reaching the decisions.

Appellant states that the two items on which he was disbarred came from a petition and letter from a hostile, opposing attorney, and that there was no prior interview of appellant before the disciplinary complaint was filed, and no pre-trial administrative hearing, and that this is lack of due process. R. 5, lines 16 to 28. He cites no authority or rule which requires such an interview or pre-trial hearing, and in his brief he concedes the formal complaint on which the panel hearing proceeded met the requirement of due process.

"B. No element of due process of law attached to the Association's proceedings herein, except service of an involved complaint."
Brief, page 9.

CLAIM NOT STATED

Appellant also asserts that it was denial of due process to place in evidence the oral decision of a Superior Court judge in the trial of a civil suit which involved his acts under consideration in the disciplinary proceeding; (R. 6, lines 8 to 16) and for the members of the hearing panel to have conducted continuous, hostile questioning of him (R. 7, lines 1 to 7). He does not assert that he made any objection to the evidence, nor to the questioning. For all that appears such procedure at the hearing met with his approval.

Appellant asserts as a further denial of due process,

"Plaintiff's defense, and evidence in support thereof, to the complaint, were incorporated by the trial committee and Board of Governors into Findings 21 and 22, and Conclusions I and II, each recommending permanent disbarment, thereon." R 5, lines 29-31.

From this statement, it is apparent that a state of facts was developed from evidence introduced by appellant which was the basis of the findings and conclusions he mentions. Having been introduced by him, there can be no error in the panel's and the

CLAIM NOT STATED

and the Board's giving it consideration. In fact, error might have been claimed if he had not been allowed to introduce the evidence. Moreover, it is not claimed that these particular findings and conclusions were referred to by the Supreme Court.

The complaint asserts as further lack of due process that he was denied the right to have Donna Teal testify, not before the panel, but before the Board of Governors, after the matter had been submitted to the Board. R. 4, lines 11 to 22. The complaint states that Donna Teal was a housekeeper hired by him for the care of his client, Della Harper. The complaint does not state what her testimony would have been. Attached to the complaint, without identification, and without reference to it in the complaint, is his statement addressed to the Board. R. 10.

. All that can be gathered from this statement is

1) Donna Teal was hired by appellant as a housekeeper for Della Harper. (COMMENT: This would necessarily be after appellant obtained the deed from Miss Harper.)

CLAIM NOT STATED

2) Donna Teal would testify that Josephine W. West was closeted with Miss Harper. (COMMENT: This means only that Miss West went into the room where Miss Harper was bedridden, and closed the door. Nothing that these women did then could be an excuse for Mr. Clark's prior act in taking Miss Harper's deed.)

3) Miss West tried to have Miss Harper execute legal documents. (COMMENT: What appellant's proof would show as to the nature of these documents, whether they would have been favorable or inimical to appellant is not stated.

It is apparent from the statement that the testimony of Donna Teal would have been immaterial. Before the Board of Governors should be asked to assemble and listen to her testimony, with the attendant expense of the hearing and supplemental transcript of the evidence, a showing should have been made that her testimony would be material. Besides, the request for a hearing does not comply with the rule. (Ante, p. 9.)

CLAIM NOT STATED

His further claim is that it was denial of due process for the court to fail to accord him his right to compensation for the work he had done in the probate proceedings involved before his removal as attorney for the personal representative. R. 7, lines 8 to 21. This, again, is not a statement of a denial of due process, but simply a claim of an erroneous decision by the Supreme Court which it had jurisdiction to make.

As to the third item, the one that was dismissed, appellant asserts it was lack of due process to refuse to hear the testimony of Ruth Meacham. He states he informed the panel she was in Bakersfield, California, and was "reluctant to testify," (R. 4, lines 0 to 9) and requested a continuance so he could produce her. R. 3, line 12. Later, he says, he petitioned the Board to hear her testimony, and filed her "court reported testimony." R. 3, lines 15 to 31.

There are two answers to his claim of want of due process: First, if it was error, it was without prejudice, because this item was recommended for

CLAIM NOT STATED

dismissal by the Board, and it was dismissed by the Supreme Court; Second, the complaint states that appellant filed "the court reported testimony of Ruth Meacham in California, which completely exonerated plaintiff of any conspiracy, or complicity, or wrongdoing." R. 3, lines 18 to 21. The findings and recommendation of the Board and of the Supreme Court, did the same thing,-- exonerated him from blame as to this item. Hearing Ruth Meacham state orally that which she stated in the "court reported testimony" could add nothing. The result would have been the same.

Appellant also asserts that he was denied equal protection of the law and due process was violated because the record as to the third item was sent to the Supreme Court. R. 4, lines 30-31, and R. 5, line 1, and R. 6, lines 21 to 31. He says that this is contrary to Rule VIII D of the rules of discipline. The rule does not support his claim; it is:

CLAIM NOT STATED

"If the formal complaint is dismissed or if there is no recommendation of discipline by the Board . . . the record of the proceeding shall be retained in the office of the Association" Rule VIII, D, 57 Wn 2d 1xii; R. 47; App. v.

It is only when the formal complaint as a whole is dismissed, not merely a portion of it, or when no discipline at all is recommended, that the record of the proceedings are to be kept in the Bar Association office.

It is submitted the complaint does not state a claim upon which relief can be granted. Characterizations and labels, even though often repeated, do not state a claim when they are contradicted by the facts alleged.

"We adopt the reasoning in Bottone v. Lindsley, 170 F 2d 705 (10th Cir. 1948) cert. denied, 336 U.S. 944, 69 S. Ct. 810, 93 L. ed. 1101 (1948), where the court said:

CLAIM NOT STATED

"(T)o make out a cause of action under the Civil Rights Statutes, the state court proceedings must have been a complete nullity, with a purpose to deprive a person of his property without due process of law. To hold otherwise would open the door wide to every aggrieved litigant in a state court proceedings, and set the federal courts up as an arbiter of the correctness of every state decision. "The Fourteenth Amendment did not alter the basic relations between the States and the national government." * * * Nor does it "assure uniformity of decisions or immunity from merely erroneous action.""

Sarelas v. Sheehan, (1963) 7th C.A.
326 Fed. 2d 490, at 491.

THE U. S. DISTRICT COURT LACKED JURISDICTION

Appellant asserts the jurisdiction of the District Court comes from the third paragraph of Section 1343 of Title 28, U. S. C., and Section 1983 of Title 42, U.S.C. R. 1 Brief, p. 1.

The third section of 1343 is:

"1343. CIVIL RIGHTS AND ELECTIVE FRANCHISE.

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * *

"(3) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of

citizens or of all persons within the jurisdiction of the United States; (Underscoring supplied.)

"June 25, 1948, c. 646, 62 Stat. 932;
Sept. 3, 1954, c. 1263, Sec. 42, 68 Stat. 1241
Sept. 9, 1957, Pub. L. 85-315, Part III,
Sec. 121, 71 Stat. 637."

It is apparent from inspection that Section 1383 Title 28 does not give a right of action. It provides a forum when a cause of action exists. To establish that a cause of action exists, it is necessary to look elsewhere.

That this is true appears more definitely from examination of the historical background of Section 1383. It was preceded by the statute of March 3, 1911, 36 Stat. 1087, 1092.

Chapter One of the statute of March 3, 1911, 36 Stat. 1087 to 1090 deals in 23 Sections with the organization of U. S. District Courts. Chapter two deals with the jurisdiction of the District Courts. The first section, numbered 24, deals with their original jurisdiction. It begins: "Sec. 24. The district courts shall have original jurisdiction as follows:" Then follow 25 subparagraphs.

The Fourteenth subparagraph is as follows:

"Sec. 24. ORIGINAL JURISDICTION. The District courts shall have original jurisdiction as follows: * * * * *

" Fourteenth: Of all suits at law or in equity authorized by law to be brought by any person ~~to redress the deprivation~~, under color of any law, statute, ordinance, regulation, custom, or usage of any State, or any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States." 36 Stat. at 1092.

(Underscoring supplied.)

This fourteenth subparagraph and two others, the twelfth and thirteenth, are the only subparagraphs in which the phrase "authorized by law" occurs. The other subparagraphs patently refer to matters within federal jurisdiction, for instance, laws relating to internal revenue, arising under postal laws, patents, and so on.

The statute of 1948, 62 Stat. 932, combines, with some change in phraseology, but not in meaning, the twelfth, thirteenth and fourteenth subparagraphs of Sec. 24, of the Act of March 3, 1911, into one section with the catch title, "Civil Rights."

Section 1343, Title 28 U.S.C. is the same as the statute of 1948, 62 Stat. 932, with the exception of changes made in 1954 and 1957. The changes made in 1954 were in the first two paragraphs of Section 1383; there was no change made in the third paragraph. 68 Stat. 1341. The changes made in 1957 were to add a fourth paragraph relating to elections, and to change the catch title to "Civil Rights and Elective Franchise." 71 Stat. 637.

There has been no change in phraseology of the third paragraph of Section 1383 since 1948, and none in substance since 1911.

Although not quoted in appellant's brief, Section 1983 of Title 42 U.S.C. is cited in it and in his complaint. For reasons stated hereafter, that section does not afford appellant a cause of action,---"a civil action authorized by law." Section 1983 is:

"1983 CIVIL ACTION FOR DEPRIVATION OF RIGHTS.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. Sec. 1979."

THE WASHINGTON STATE BAR ASSOCIATION IS NOT
A "PERSON" WITHIN THE MEANING OF SEC. 1983

In holding that Kittitas County, Washington, is not a "person" within the meaning of Section 1983, this court said:

"Congress did not undertake to bring municipal corporations within the ambit of 42 U.S.C. Sec. 1983. Monroe v. Pape, 365 U.S. 167 (in which the statute is designated as R.S. Sec. 1979). The considerations which have led to this conclusion, based largely upon an examination of the legislative history, indicate that this is likewise true of a state or county.

NOT A PERSON

See the legislative history reviewed in Monroe v. Pape, pages 188-191 of 365 U. S. pp. 484-486 of 81 S. Ct. It follows that the action was properly dismissed as to defendant Kittitas County."

Sires v. Cole, (1963) 9 C.A. 320 Fed. 2d 877.

APPEAL IS THE ONLY REMEDY

Federal court decisions from 1857 to 1962 are that for errors denying constitutional rights in state court proceedings the remedy of the aggrieved is by appeal, and not by suit in the District Court.

David Secomb was disbarred by the Supreme Court of the Territory of Minnesota, without notice, and without a hearing. He petitioned the U. S. Supreme Court to order the Minnesota court to vacate the order of disbarment. The court through Chief Justice Taney, said:

"It is not necessary to inquire whether this decision of the Territorial court can be reviewed here in any other form of proceeding.

The first of these is the fact that the
 system is not a simple one, and that it
 is not a simple one, and that it is not a simple one.

It is a simple one, and it is a simple one.

It is a simple one, and it is a simple one.

It is a simple one, and it is a simple one.

It is a simple one, and it is a simple one.

It is a simple one, and it is a simple one.

It is a simple one, and it is a simple one.

It is a simple one, and it is a simple one.

It is a simple one, and it is a simple one.

It is a simple one, and it is a simple one.

It is a simple one, and it is a simple one.

It is a simple one, and it is a simple one.

It is a simple one, and it is a simple one.

It is a simple one, and it is a simple one.

It is a simple one, and it is a simple one.

It is a simple one, and it is a simple one.

It is a simple one, and it is a simple one.

It is a simple one, and it is a simple one.

It is a simple one, and it is a simple one.

But the court are of opinion that he is not entitled to a remedy by mandamus. Undoubtedly the judgment of an inferior court may be reversed in a superior one which possesses appellate power over it, and a mandate be issued, commanding it to carry into execution the judgment of the appellate tribunal. But it cannot be reviewed and reversed in this form of proceeding, however erroneous it may be or supposed to be. And we are not aware of any case where a mandamus has issued to an inferior tribunal, commanding it to reverse or annul its decision, where the decision was in its nature a judicial act, and within the scope of its jurisdiction and discretion."

Ex parte Secombe (1857) 60 U.S. (19 How.)
9 (at 15) 15 L. ed. 565.

In Selling v. Radford, in which the U.S. Supreme Court gave consideration to the procedure to be followed in determining whether a lawyer disbarred by a state should continue as a member of the bar of the U. S. Supreme Court, the court said:

" . . . we have no authority to re-examine or reverse as a reviewing court the action of the Supreme Court of Michigan in disbarring a member of the bar of the courts of that state for personal and professional misconduct."

Selling v. Radford (1917) 243 U. S. 46.

APPEAL ONLY REMEDY

Wm. V. Rooker petitioned the U. S. District Court to declare void a judgment of the Supreme Court of a state because his constitutional rights were violated. In affirming the dismissal of the action because of lack of jurisdiction, the U. S. Supreme Court said:

"If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. (Citing cases) Under the legislation of Congress, no court of the United States other than this court could entertain a proceeding to reverse or modify the judgment for errors of that character. (Citing authority.) To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original."

Rooker v. Fidelity Trust Co. (1923)
263 U. S. 413.

John E. Gately sued six judges of the Supreme Court of Colorado in the U. S. District Court relying on Section 1983 of Title 42 U.S.C. He asked that the

District Court order the Supreme Court of Colorado to set aside the disbarment and to award him damages. In sustaining an order of dismissal on the ground that the District Court was without jurisdiction, the Circuit Court said:

"The Supreme Court of Colorado has exclusive jurisdiction to admit attorneys to practice in the Colorado courts and to strike them from the roll for misconduct. (Citing a Colorado statute.) The Federal courts do not have jurisdiction to review an order of the Colorado Court disbarring an attorney in that state for personal and professional misconduct. (Citing cases.) In *Theard v. United States*, 354 U.S. 278, 281, 77 S. Ct. 1274, 1276, 1 L. ed 2d 1342, the Supreme Court said:

'It is not for this court, except within the narrow limits for review open to this court, as recently canvassed in *Konigsberg v. California* 353 U. S. 252, (77 S. Ct. 722, 1 L. ed 2d 810), and *Schware v. Board of Bar Examiners*, 353 U.S. 232 (77 S. Ct. 752, 1 L. ed. 2d 796), to sit in judgment on Louisiana disbarments, and we are not in any event sitting in review of the Louisiana judgment. While a lawyer is admitted into a federal court by way of a state court, he is not automatically sent out of the federal court by the same route. The two judicial systems of courts, the state judiciatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included. * * * *'

The limits of review referred to are violations, in the course of disbarment proceedings, of the due process or equal protection clauses of the fourteenth amendment, and a petition for a writ of certiorari to the Supreme Court of the United States is the only method by which review may be had."

Gately v. Sutton, et al. 10 C.A. (1962)
310 Fed 2d 107

THE WASHINGTON STATE BAR ASSOCIATION
IS IMMUNE FROM THIS CHARACTER OF ACTION

It is apparent from Appellant's complaint that the actions of which he complains were carried out by the Association as a judicial function, similar to that of a master in chancery, as an aid to the Supreme Court. In fact, the Association is powerless to vacate the order of disbarment, as asked by Mr. Clark's complaint. Its only function was one of recommendation in the first place. For its acts in a judicial capacity the Association is immune from suit, even under 1983 of Title 42.

Richard A. Sires sued the prosecuting attorney and his deputy, and the trial judge for damages because he was imprisoned, under sentence, for

longer than was authorized by law. In sustaining the dismissal of the action, this court said:

"Judges are immune from suit arising out of their judicial acts, without regard to the motives with which their judicial acts are performed, and notwithstanding such acts may have been performed in excess of jurisdiction, provided there was not a clear absence of all jurisdiction over the subject matter.

(Citing cases) * * * *

"The remaining defendants are the prosecuting attorney and a deputy prosecuting attorney of Kittitas County. A prosecuting attorney is a quasi-judicial officer and enjoys the same immunity from a civil action for damages as that which protects a judge."

Sires v. Cole, (1963) 9 C.A. 320 Fed. 2d 877.

THE PRACTICE OF LAW IS NOT A
PRIVILEGE GUARANTEED BY THE CONSTITUTION
OR LAWS OF THE UNITED STATES

The right to practice law in the state courts is a right granted by the state, not by the United States.

In Mitchell v. Greenough, 9 C.A. (1938)

100 Fed. 2d 184, at 185, this court said:

"We pause here to observe that the right to practice law in the state court has been held by the Supreme Court not to be a privilege granted by the Federal Constitution or laws."

RIGHT TO PRACTICE LAW
NOT GRANTED BY U. S.

In Emmons v. Smitt, 6 C.A. (1945) 149 Fed 2d 669, at 672, the court said:

"We search in vain for a basis for jurisdiction of the District Court over plaintiff's action, in so far as it seeks to secure to him the right to practice his profession. The claim that it is found in subsection (14) of Sec. 41, 28 USCA.* (Suits to redress deprivation of civil rights) is without merit, since plaintiff's right to practice law is not secured to him by the Constitution nor by any law of the United States. It is not a property right but a privilege granted by the state of Michigan (citing cases.)

Emmons v. Smitt, 6 C.A. (1945) 149 Fed. 669, at 670.

* Now Section 1983, Title 42.

Besides showing that the District Court is without jurisdiction, the foregoing analysis shows not only that the complaint does not state a claim for which relief can be granted, but, in addition, it shows that no amended complaint can state such a claim. This is for the reason that no amended complaint can state:

RIGHT TO PRACTICE LAW
NOT GRANTED BY U. S.

THE UNIVERSITY OF CHICAGO

CHICAGO, ILLINOIS

TO THE HONORABLE SENATE OF THE UNIVERSITY OF CHICAGO
I have the honor to acknowledge the receipt of your letter of the 14th inst. in relation to the proposed amendment to the constitution of the University, and to inform you that the same has been referred to the Committee on the subject, and that they have the honor to report to you that they are in favor of the same.

Very respectfully,
Your obedient servant,

JOHN D. COVILLE, Secretary

THE UNIVERSITY OF CHICAGO
CHICAGO, ILLINOIS
JANUARY 15, 1892

THE UNIVERSITY OF CHICAGO
CHICAGO, ILLINOIS

- 1) that the Association is a "person"
- 2) that appeal is not the only remedy for the faults he claims
- 3) that the Association is not immune from such a suit, or
- 4) that the right to practice law in a state court is a right or privilege guaranteed by the Constitution of the United States.

ARGUMENT IN ANSWER TO APPELLANT

The matters that appellant points out in argument do not differ from that which is stated in his complaint. Again he recites claimed errors in the disciplinary proceedings, which, even if true, would be no more than errors of decision, within the jurisdiction of the court, errors which can be questioned only on appeal, and not in an oblique attack in the U. S. District Court.

None of the cases cited by appellant support the jurisdiction of the District Court. Only one of them even involves the subject of jurisdiction.

ARGUMENT IN ANSWER

Six were U. S. Supreme Court citations, in which the proceeding reached that Court by certiorari to a state court. These are, alphabetically listed, Chambers v. Florida, Holt v. Virginia, Konigsberg v. California, Schware v. Board, Willner v. Committee, and Young v. Ragen.

Chambers v. Florida, 309 U. S. 227, 84 Law Ed. 716, (Appellant's brief, p. 12) involved the affirmance by the Supreme Court of Florida of a murder conviction and the admission of a confession in evidence. Holt v. Virginia (1965) 14 Law Ed. No. 3, p. 220, (Brief, p. 13-14) involved the propriety of the convictions of two lawyers for contempt on account of language used in asking for a change of venue. Konigsberg v. California, (1957) 353 U. S. 252, 77 S. Ct. 722 (Brief p. 9) and Schware v. Board, (1957) 353 U. S. 233, 77 S. Ct. 752 (Brief, pp. 9, 11, 13) and Willner v. Committee on Character and Fitness (Brief, pp. 7, 9, 12) involved the correctness of the decisions of the Supreme Courts of California, New Mexico, and New York, respectively, which denied

applicants admission to the bar. Young v. Ragen, 337 U. S. 235, 93 Law Ed. 1333, 695 S. Ct. 1073, presented the correctness of the decision of the Circuit Court of Randolph County, Illinois, which denied a petition for habeas corpus without a hearing.

In two cases cited certiorari was granted by the U. S. Supreme Court to a U. S. Court of Appeals. They are Greene v. McElroy and Theard v. U. S. Greene v. McElroy, (1959) 360 U. S. 474, 79 S. Ct. 1400 (Brief p. 9) came to the U. S. Supreme Court by certiorari to the U. S. Court of Appeals for the District of Columbia. Greene had sued in the U. S. District Court for the District of Columbia to have his security clearance restored. The decision of that court had been appealed to the Court of Appeals. In Theard v. U. S., 354 U. S. (1957) 278, 77 S. Ct. 1274 (Brief, pp. 7, 9, 15) certiorari was granted to the Court of Appeals for the 5th Circuit, which had affirmed the decision of the U. S. District Court for the Eastern District of Louisiana striking Theard's name from the rolls of the attorneys admitted

to practice before the U. S. District Court, on the basis of his disbarment by the Louisiana Supreme Court, without a hearing in the U. S. District Court as to the correctness of the state court's decision.

Gray v. Wilson (Nor. Dist. Cal., 1964) 230 Fed. Supp. 860, cited on page 9 of appellant's brief, is the decision of the U. S. District Court on habeas corpus that Gray was improperly convicted in the state court of assault with a deadly weapon, because no witness testified against him at the trial and the case was presented, without his consent, only on a transcript of testimony taken at a preliminary hearing, and, without his consent, to a judge without a jury.

In Ex Parte Wall (1883) 107 U. S. 265 (Brief, p. 9) a petition was presented to the U. S. Supreme Court by Wall for mandamus to the U. S. District Court for the southern district of Florida to vacate the order of the latter court as a lawyer disbarring Wall in that court. Wall had been disbarred because the District Judge found that he had been a member of a lynching party.

Re Fletcher, (1955) 221 Fed. 2d 477, 4th C. A. cited at page 8 of appellant's brief, involved this situation: Fletcher had been disbarred by the Court of the District of Columbia. For that reason the U. S. District Court for the Eastern District of Virginia disbarred him in that court. The case reached the Fourth Circuit by appeal.

Selling v. Radford (1961) 243 U. S. 26, 37 S. Ct. 377, cited at page 8 of appellant's brief, came to the Supreme Court by petition that Radford be disbarred in that court because he had been disbarred in a state court; an order was issued to Radford that he show cause why he should not be disbarred in the U. S. Supreme Court. The cited decision gives the court's reasons for doing so.

The decision in Bradley v. Fisher, 80 U. S. (13 Wall.) 355, 20 Law Ed. 646, cited on pages 9 and 15 of appellant's brief, was on a writ of error to the Supreme Court of the District of Columbia. Fisher, a judge of Supreme Court of the District of Columbia had previously stricken Bradley's name from

the roll of attorneys, and the U. S. Supreme Court had ordered his name restored to the roll. Bradley sued Fisher for damages. It was in holding that the Judge was immune from such a suit that the court made the passing comment quoted on page 15 of appellant's brief.

Sarelas v. Sheehan, (1963) 326 Fed. 2d 490, 7th C. A., cited on pages 9 and 13 of appellant's brief, is the only case cited which involves jurisdiction. Sarelas sued Sheehan in the U. S. District Court, claiming that as a deposition officer appointed by the Circuit Court of Cook County, Illinois, Sheehan had acted in violation of his duties. The District Court dismissed the action, on the ground that Sheehan was immune as an officer performing a quasi-judicial function. The 7th Court of Appeals said:

"Although we could base our decision on the ground of judicial immunity, it is unnecessary to reach that question. Another reason even more fundamental than the doctrine of immunity prevents plaintiff from pursuing his action. A claim under the Civil Rights Act requires that a plaintiff show deprivation

of his constitutional rights. In the instant action plaintiff alleges no deprivation of such rights.

"Plaintiff has alleged in his complaint that irregularities may have occurred during the course of the state court litigation. There is no suggestion that the deposition proceeding was a sham or contrivance. If defendant's actions as the deposition officer were inconsistent with the laws of the State of Illinois, plaintiff's recourse was to complain to the court that appointed the defendant, and if necessary, pursue his complaint in the appellate courts of Illinois.

"The events that gave rise to plaintiff's 'rights' on which he bases his action, are not of constitutional stature, vindicable under the Civil Rights statutes. Constitutional due process and equal protection of the laws have a more fundamental meaning than plaintiff ascribes to them in this action. Mere errors and irregularities occurring in a judicial proceeding must be differentiated from a situation where the proceeding itself is a sham or nullity."

(Then follows the language quoted above on page 21.)

Sarelas v. Sheehan, (1963) 7th C.A. 326
Fed 2d 490, 491.

It is respectfully submitted the order
dismissing appellant's action should be affirmed.

T. M. Royce
Attorney for the
Washington State Bar Association

February 8, 1966

APPENDIX

STATE BAR ACT

"OBJECTS AND POWERS. There is hereby created as an agency of the state, for the purpose and with the powers hereinafter set forth, an association to be known as the Washington State Bar Association, hereinafter designated as the state bar, which association shall have a common seal and may sue and be sued, and which may, for the purpose of carrying into effect and promoting the objects of said association, enter into contracts and acquire, hold, encumber and dispose of such real and personal property as is necessary thereto."
RCW 2.48.010, Laws 1933, ch. 94, sec. 2, page 397.

"BOARD OF GOVERNORS. There is hereby constituted a board of governors of the state bar, which shall consist of the president of the state bar, as an ex-officio member, and of one member elected by **secret ballot** by mail by the active members residing in each congressional district now or hereafter existing in the state"
RCW 2.48.030, Laws 1933, ch. 94, sec. 5, page 398.

"STATE BAR GOVERNED BY BOARD OF GOVERNORS. The state bar shall be governed by the board of governors which shall be charged with the executive functions of the state bar and the enforcement of the provisions of RCW 2.48.010 through 2.48.180 (the State Bar Act) and all rules adopted in pursuance thereof. . . ."
RCW 2.48.040, Laws 1933, ch. 94, sec. 6, page 398.

"NEW MEMBERS. After the organization of the state bar, as herein provided, all persons who are admitted to practice in accordance with the provisions of RCW 2.48.010 and through 2.48.180, (the State Bar Act), except judges of courts of record, shall become by that fact active members of the state bar."

RCW 2.48.021, Laws 1933, ch. 94, sec. 4, page 398.

"ADMISSION AND DISBARMENT. The said board of governors shall likewise have power, in its discretion, from time to time to adopt rules, subject to the approval of the supreme court, fixing the qualifications, requirements and procedure for admission to the practice of law; and, with such approval, to establish from time to time and enforce rules of professional conduct for all members of the state bar; and, with such approval, to appoint boards or committees to examine applicants for admission; and, to investigate, prosecute and hear all causes involving discipline, disbarment, suspension or reinstatement, and make recommendations thereon to the supreme court; and, with such approval, to prescribe rules establishing the procedure for the investigation and hearing of such matters, and establishing county or district agencies to assist therein to the extent provided by such rules: Provided, however, that no person who shall have participated in the investigation or prosecution of any such cause shall sit as a member of any board or committee hearing the same."

RCW 2.48.060; Laws 1933, ch. 94, sec. 8, page 399.

RULES OF DISCIPLINE

Adopted by the Supreme Court of Washington.
Effective January 2, 1961

Rule V, C.

"HEARING PANEL. Each disciplinary matter referred for hearing shall be heard by a three-member Hearing Panel appointed by the President of the Association at the time he signs the formal complaint. The Panel shall be composed of one member from the Board and two members from the Local Trial Committee of the county or district where the respondent attorney had his residence at the time of the alleged violation of the rules of professional conduct."

57 Wn 2d 11, R. 38.

Rule VIII, I

"... Witnesses shall testify under oath administered by the chairman of the Panel."

57 Wn 2d 1vii, R. 43.

Rule V, D

"DUTIES. * * * The Panel shall make its findings, conclusions and recommendation, submitting them to the Board together with all pleadings, documents and exhibits within 15 days from the date the taking of evidence is concluded."

57 Wn 2d 11i, R. 39.

Rule VIII, A

"NOTICES. When the findings, conclusions and recommendation of a Panel are filed in the office of the Association, a copy thereof and a notice of filing with a copy of Rule VIII shall be served upon the respondent attorney or his counsel"

57 Wn 2d 1xi, R. 45.

Rule VIII, B

"STATEMENT IN SUPPORT OR OPPOSITION. At any time within twenty days after the service of the above-mentioned notice the State Bar Counsel and the respondent attorney shall have the right to file with the Board a typewritten statement in support of or in opposition to the findings, conclusions and recommendation of the Panel, setting forth facts, alleged errors of law or any other matter in support of such statement. A copy of such statement, when filed, shall be served on the respondent attorney or his counsel, or State Bar Counsel, as the case may be."

57 Wn 2d 1x1, R. 46.

Rule VIII, C.

"ADDITIONAL HEARING. In making the above statement in support of or in opposition to the findings, conclusions and recommendation of the Panel, State Bar Counsel or the respondent attorney may request an additional hearing before the Panel based on the ground of additional evidence; provided, however, that such statement shall contain a complete outline of such additional evidence and shall set forth the reasons why the same was not presented at the hearing, all supported by affidavit or affidavits. Such request may be granted or denied in the discretion of the Board."

57 Wn 2d 1x1, R. 46.

Rule VIII, D.

"BOARD REVIEW. Each proceeding in which a hearing has occurred shall be reviewed by the Board upon the record made and filed in the office of the Association, together with the statements in support of or in opposition to such findings, conclusions and recommendation as provided by Rule VIII, B and C. Neither State Bar Counsel nor the respondent attorney shall be entitled to be heard orally in such review, unless otherwise ordered by the Board."

57 Wn 2d 1xii, R. 46.

Rule VIII, D

" * * * Prompt decision of the Board upon such review shall be made. The Board shall make findings, conclusions and its recommendation as to whether the formal complaint shall be dismissed, or there shall be no discipline, or the respondent attorney shall be censured, reprimanded, suspended or disbarred, and a copy thereof shall be served on the respondent attorney. If requested in writing by the person complaining against the respondent attorney, the recommendation of the Board shall be furnished to such person.

If the formal complaint is dismissed or if there is no recommendation of discipline by the Board or if the recommendation is that the respondent attorney be censured or reprimanded and the censure or reprimand is accepted by the respondent attorney, the record of the proceeding shall be retained in the office of the Association, with notice thereof sent to the Supreme Court, which notice shall remain confidential, and such censure or reprimand shall be given privately by the board; provided, however, if the respondent attorney has a previous reprimand on his record, the current reprimand may be published in full in the next issue of the Washington State Bar News.

If the recommendation of the Board is that the respondent attorney be censured or reprimanded and such recommendation is not accepted by the respondent attorney, or if the recommendation is that the respondent attorney be suspended or disbarred, the record shall be transmitted to the Supreme Court.

If any member or members of the Board shall dissent from the findings, conclusions or recommendation of the majority of the Board, he or they shall state briefly his or their reasons therefor, and a copy shall be served upon the respondent attorney or his counsel. Such dissent or dissents shall be a part of the record.

The member of the Board who shall have served on the Panel shall not participate in the review.

No suspension or disbarment shall be recommended by the Board unless and until a transcript of the testimony before the Panel shall have been reduced to writing and settled as in this rule provided, and circulated to each member of the Board."

Rule IX

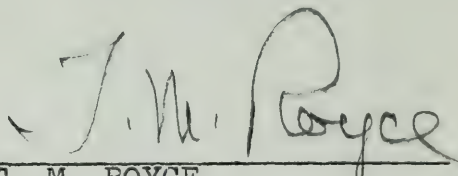
"* * * At the termination of the twenty days, (for filing a reply brief) the clerk of the Supreme Court shall enter the cause upon the docket of the court for hearing on any day occurring not less than ten days thereafter and shall notify by mail the respondent attorney and State Bar Counsel of the time fixed for such hearing. The cause may be submitted on briefs or with oral argument. Each party shall have one-half hour for argument."

57 Wn 2d lxiv, R. 47.

-

CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the U. S. Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with these rules.


T. M. ROYCE
Attorney for the
Washington State Bar Association

No. 20302

In the

United States Court of Appeals

For the Ninth Circuit

CAPITAL INSURANCE & SURETY COMPANY,
INC.,

Appellant,

vs.

JOHN V. KELLY as an individual, JOHN V.
KELLY as an heir to the estate of Mar-
jorie A. Kelly, deceased, JOHN KELLY,
a minor, and DON V. KELLY, a minor,
both heirs to the aforesaid estate, by
and through JOHN V. KELLY, their
father and next friend,

Appellee.

On Appeal from the District Court of Guam

Appellant's Opening Brief

WALTER S. FERENZ
BARRETT, FERENZ & TRAPP

Penthouse—1924 Broadway
Oakland, California 94612

Attorneys for Appellant

FILED

FRANK H. SCHWAB

SUBJECT INDEX

	Page
Jurisdictional Statement	1
Statement of Case	2
Specification of Errors Relied On	3
Statutes and Insurance Policy Provisions Involved	3
Questions Presented	5
Argument	5
Neither the Guam Direct Action Statute Nor the Guam Financial Responsibility Law (Nor Any Other Provision of Guam Law) Provide a Direct Cause of Action for Per- sonal Injury or Wrongful Death Against the Insurer of a Deceased Tort-Feasor When the Cause of Action Against the Tort-Feasor Is Abated by Reason of His Death.....	5
Conclusion	14
Certificate of Counsel	14

TABLE OF AUTHORITIES CITED

CASES	Pages
Cort v. Steen (1950), 36 Cal. 2d 437, 224 P.2d 723.....	6
Dandridge v. Fid. & Cas. Co. (La.App. 1939), 192 So. 887.....	11
Degelos v. Fidelity & Casualty Co. of New York (5th Cir. 1963), 313 F.2d 809	10
Finlay v. Std. Accid. Ins. Co. (La.App. 1944), 19 So.2d 302....	10
Finn v. Employers Liability Assurance Corp. (La.App. 1962), 141 So.2d 852	11
Fortenberry v. Preferred Accident Ins. Co. (La.App. 1950), 48 So.2d 657	10
Haines v. Harrison (Sup. Ct. Miss. 1948), 357 Mo. 956, 211 S.W.2d 489	12, 13
Hunt v. Authier (1946), 28 Cal. 2d 288, 169 P.2d 913.....	6
Kujawa v. American Indemnity Co. (Sup. Ct. Wis. 1944), 14 N.W. 2d 31	11
McHenry v. American Employers Ins. Co. (La. App. 1944), 18 So. 2d 840.....	8, 9, 10
Moffett v. Smith (1949), 33 Cal. 2d 905, 206 P.2d 353.....	6
Restelle v. Fidelity & Casualty Co. (La.App. 1949), 41 So.2d 469	10
Rome v. London & Lancashire Indemnity Co., (La. App. 1936), 169 So. 133	8
Segal v. Ohio Casualty Co. (Sup. Ct. Wis. 1937), 272 N.W. 665	11
Severns v. California Highway Indemnity Exchange (1929), 100 Cal. App. 384, 280 P. 213	6, 7
Sumait v. Capital Insurance & Surety Co. (9th Cir. 1961), 296 F.2d 108	6, 7
Wiechmann v. Huber (Sup. Ct. Wis. 1933), 248 N.W. 112.....	11, 13

TABLE OF AUTHORITIES CITED

iii

STATUTES	Pages
Government Code of Guam :	
§§ 23525 et seq.	3
§ 23528(f)	7
§ 23529(a)	3
§ 43354	3, 5
§ 43357	6
Guam Code of Civil Procedure, § 377	4
Louisiana Revised Civil Code, Art. 2402	8
LSA—R.S. 22:655	8

TEXT

Couch on Insurance 2d, § 45:789, pp. 685-686.....	10
---------------------------------------------------	----

No. 20302

In the

United States Court of Appeals

For the Ninth Circuit

CAPITAL INSURANCE & SURETY COMPANY,
INC.,

Appellant,

vs.

JOHN V. KELLY as an individual, JOHN V.
KELLY as an heir to the estate of Mar-
jorie A. Kelly, deceased, JOHN KELLY,
a minor, and DON V. KELLY, a minor,
both heirs to the aforesaid estate, by
and through JOHN V. KELLY, their
father and next friend,

Appellee.

On Appeal from the District Court of Guam

Appellant's Opening Brief

JURISDICTIONAL STATEMENT

The jurisdiction of this action is vested in the District Court of Guam by § 22(a) of the Organic Act of Guam, as amended, 72 Stat. 178 (1958), 48 U.S.C.A. § 1424(a), and § 82(4) of the Guam Code of Civil Procedure, in that the amount alleged to be in controversy exceeds the sum of \$2,000.00, exclusive of costs and interest. This Court has

jurisdiction of this appeal. 28 U.S.C.A., §§ 41, 1291 and 1294(4).

STATEMENT OF CASE

During the evening of October 24, 1964, Dale S. Jones, Jr. (appellant's insured) was involved in a two-car automobile accident. The insured was the sole occupant and driver of one of the cars and died at the scene of the accident. The occupants of the other car were John V. Kelly, appellee, and his wife, Marjorie. Appellee sustained personal injuries and his wife, Marjorie, was fatally injured. The appellee brought an action to recover for his injuries, car damage, and for the wrongful death of Marjorie, under Guam's direct action statute, against Capital Insurance & Surety Company, appellant as the insured's liability insurance company. At pretrial, the parties stipulated as to the amount of damages suffered by appellees and submitted the matter to the court on the issue of whether appellees have any cause of action against appellant insurance company when the insured died before the action was brought against the insurance company. The policy attached to appellant's answer was also admitted to be the policy in question. This same issue was raised by appellant's motion for judgment on the pleadings, which motion was denied.

The parties stipulated after pretrial that the insured died prior to the commencement of the action and that he was negligent in the operation of his vehicle resulting in the accident causing the death and injuries upon which the action was based.

The parties submitted written briefs to the court and on May 14, 1965, the court handed down an opinion holding that abatement caused by the death of the insured tortfeasor is not a defense in Guam to a direct action against the tort-feasor's insurance company. Upon the entry of the

stipulation as the amount of injury and loss suffered by appellees, judgment was entered against appellant in the total amount of \$14,000.00.

SPECIFICATION OF ERRORS RELIED ON

Appellant contends that the District Court of Guam erred in holding and deciding that the Guam direct action statute gave appellees a cause of action for personal injuries and for wrongful death against appellant insurance company where none existed against appellant's insured because of abatement.

STATUTES AND INSURANCE POLICY PROVISIONS INVOLVED

1. Guam's direct action statute, as it appears at § 43354, Government Code of Guam.

Liability policy: direct action. On any policy of liability insurance the injured person or his heirs or representatives shall have a right of direct action against the insurer within the terms and limits of the policy, whether or not the policy of insurance sued upon was written or delivered in Guam, and whether or not such policy contains a provision forbidding such direct action, provided that the cause of action arose in Guam. Such action may be brought against the insurer alone, or against both the insured and insurer.

2. Guam's Financial Responsibility Law, as it appears in Chapter 7 of Title XXIV, Government Code of Guam, §§ 23525 et seq., a pertinent provision of which is provided in § 23529(a) as follows:

Insurance. (a) No policy or bond shall be effective under Section 23528 unless issued by an insurance company or surety company authorized to do business in Guam, nor unless such policy or bond is subject, if the accident has resulted in bodily injury or death, to limits, exclusive of interest and costs, of not less than

Five Thousand Dollars (\$5,000.00) because of bodily injury to or death of one person in any one accident and Ten Thousand Dollars (\$10,000.00) because of bodily injury to or death of two or more persons in any one accident, and Five Thousand Dollars (\$5,000.00) because of injury to or destruction of property of others in any one accident.

(For purposes of brevity, the entire law is not set forth in full.)

3. Guam's wrongful death statute, § 377, Guam Code of Civil Procedure, is as follows:

Actions for causing death, etc. When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case, may be just.

4. Coverages C and D of paragraph I of Insuring Agreements of the policy involved in this case, read as follows:

Coverage C. Bodily Injury Liability. To indemnify the insured for all sums which he shall become legally obligated to pay as damages because of bodily injury, including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the ownership, maintenance or use of the automobile.

The words "bodily injury," and the word "injury" when referring to bodily injury, shall be deemed to include "sickness or disease."

Coverage D. Property Damage Liability. To indemnify the insured for all sums which he shall become legally obligated to pay as damages because of injury

to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the automobile.

QUESTIONS PRESENTED

The question presented by this appeal is whether Guam's direct action statute or any other provision of applicable law permits an injured party or the heirs of a deceased person to recover from an insurance company in Guam when the cause of action for personal injury and for wrongful death are abated by the death of the insured tort-feasor.

ARGUMENT

Neither the Guam Direct Action Statute Nor the Guam Financial Responsibility Law (Nor Any Other Provision of Guam Law) Provide a Direct Cause of Action for Personal Injury or Wrongful Death Against the Insurer of a Deceased Tort-Feasor When the Cause of Action Against the Tort-Feasor Is Abated by Reason of His Death.

Guam is a direct action jurisdiction as provided by § 43354 of the Government Code of Guam. This section reads in full as follows:

“Liability policy: direct action. On any policy of liability insurance the injured person or his heirs or representatives shall have a right of direct action against the insurer *within the terms and limits of the policy*, whether or not the policy of insurance sued upon was written or delivered in Guam, and whether or not such policy contains a provision forbidding such direct action, provided that the cause of action arose in Guam. Such action may be brought against the insurer alone, or against both the insured and insurer.” (Emphasis supplied.)

The law of Guam provides that when the tort-feasor dies prior to the commencement of any action against him,

all causes of action for wrongful death and personal injury are abated. In the written opinion filed herein, the Court states as follows:

“The Guam Codes were originally adopted from California in 1933, at which time the California courts had held that torts of this kind did not survive the death of the tort-feasor.¹ When Guam took the California Codes, it took the construction placed upon such codes by the California courts, *United States v. Johnson*, 181 F.2d 577. *McClellan v. Automobile Ins. Co. of Hartford, Conn.*, 80 F.2d 344 (9 Cir. 1935), was a case which arose in Arizona but so many California cases are cited as to make it abundantly clear that survival did not exist. The plaintiffs herein do not contend to the contrary.”

The insurance policy upon which the action below was based provides, in Coverages C and D, that the appellant insurance company will indemnify the insured for those amounts for which he shall become legally obligated to pay as damages because of bodily injury including death or property damage.²

This court has already held in *Sumait v. Capital Insurance & Surety Co.* (9th Cir. 1961), 296 F.2d 108, that in

1. *Severns v. California Highway Indemnity Exchange* (1929), 100 Cal. App. 384, 280 P. 213. But cf. *Hunt v. Authier* (1946), 28 Cal. 2d 288, 169 P.2d 913; *Moffett v. Smith* (1949), 33 Cal. 2d 905, 206 P.2d 353; and *Cort v. Steen* (1950), 36 Cal. 2d 437, 224 P.2d 723. The *Cort* case was decided after California amended its survival statutes to obviate the decisions in *Hunt* and *Moffett* cited above.

2. § 43357 of the Government Code of Guam provides that no insurance company shall use a policy form in Guam without first obtaining the prior approval of the Commissioner of Insurance. There is, of course, no contention in this case that the form of policy sued upon was not previously approved by the Commissioner, nor was it contended that the policy was in any way contrary to Guam law.

Guam a claimant in an action against an insurance company must bring himself "within the terms and limits of the policy." In *Sumait*, this court held that because the plaintiff had failed to establish any liability of insured to the plaintiff, the insurer could not be held liable.

The question, hence, reduces itself as to whether or not there is any basis to sustain the conclusion of the lower court that appellees are not precluded in their action by the abatement caused by the death of the insured.

The court below, in its opinion, appears to rely on the fact that the direct action statute read together with the Guam Financial Responsibility Law constitute a legislative pronouncement of a public policy sustaining appellant's liability despite abatement. However, the Guam Responsibility Law in its entirety, and in particular § 23528(f) which was cited by the Court, shows clearly that the Guam Responsibility Law, like that of California, is simply to encourage motorists to provide insurance or face a suspension of their driving licenses in the event of an automobile collision causing property damage or personal injury. It is in no sense a compulsory insurance law.³ The non-insured motorist has the alternative of either depositing cash or bond or giving up his license. Where a motorist surrenders his license, the Financial Responsibility Law leaves an injured party with no financial recourse. Hence, the law taken as a whole can hardly constitute a legislative pronouncement of a public policy giving all injured parties

3. Compare the municipal ordinance in *Severns v. California Highway Indemnity Exchange* (1929), 100 Cal. App. 384, 280 P. 213, which required or made mandatory insurance (or a bond) for jitney operators. The court nonetheless held that despite the compulsory aspect of insurance, abatement by death of the tortfeasor did not permit a direct action against the insurer.

a source from which to seek damages, much less a direct action against an insurance company.

The trial court also relies heavily upon Louisiana authorities from which the court concluded that the Louisiana rule is that personal defenses available to the tort-feasor were not available to his insurer.⁴

The cases cited in the opinion are *Rome v. London & Lancashire Indemnity Co.*, (La. App. 1936), 169 So. 133 and *McHenry v. American Employers Ins. Co.* (La. App. 1944), 18 So. 2d 840.

In *Rome*, the court held that in Louisiana the public policy preventing a tort suit against a public agency did not constitute a bar to a direct action against the agency's liability insurer. The bar of suit against the agency was sovereign immunity—a defense that in no way effected the cause of action. Abatement, on the other hand, destroys the cause of action itself and is not a mere shield or cloak belonging to a party.

The *McHenry* case, on close analysis, is equally not applicable to the case at bar. Plaintiff McHenry was injured when his wife, while backing an automobile insured by the defendant, lost control thereof and it struck the plaintiff husband. At the time the accident occurred, Mrs. McHenry, the driver of the car, was in the employment of the Welcome Wagon Service Company and the suit was against her employer's insurance company. Under a statute of Louisiana,⁵ damages resulting from personal injuries to the wife did not form a part of the marital community but was the wife's separate property. Thus, the husband had no personal interest

4. Guam's direct action statute is patterned after Louisiana. LSA—R.S. 22:655.

5. Article 2402 of the Revised Civil Code, as amended and re-enacted by Act 68 of 1902.

in whatever his wife may recover in an action for personal injuries. On the other hand, in Louisiana, if the husband recovered damages resulting from personal injuries, the amount recovered fell into the community and became a community asset in which the wife has an interest by virtue of the marital relationship. On this basis, counsel for the insurance company in the *McHenry* case contended, apparently as a matter of first impression, that a recovery for plaintiff McHenry would be contrary to public policy; that is, it would permit Mrs. McHenry to profit from a cause of action which she herself brought about by her own negligence.

Under procedures available in Louisiana, the State Court of Appeals certified this question to the Supreme Court of Louisiana seeking an advisory opinion upon the question of law raised by the defense.

In *McHenry v. American Employers Ins. Co.* (1944), 206 La. 70, 18 So.2d 656, the Supreme Court of Louisiana held that the mere fact that plaintiff and his wife were living together in community at the time plaintiff was injured as a result of wife's negligence, did not prevent plaintiff from recovering from the insurer. The court held that the community would not be enriched by recovery but would only secure reimbursement for a loss it had sustained.

The Court of Appeals then held, in *McHenry v. American Employers Ins. Co.* (1944), 18 So.2d 840, that the suit against the insurance company was properly brought under Louisiana law since the negligent operator of the vehicle insured by the defendant insurance company was an employee acting within the scope of her authority and that there was no public policy considerations to otherwise bar the suit.

Stated otherwise, it would appear to be the law as established by *McHenry* that because public policy would not prevent a husband from suing the insurance company of an employer of the wife, this ground is not a defense in any situation and hence is not a defense under the direct action statute.

Most certainly the *McHenry* case is not authority for the proposition that a defense which exists as between a tortfeasor and the injured party cannot be raised by an insurance company under a direct action statute in Louisiana.

The correct rule of Louisiana has been stated in *Couch on Insurance* 2d, § 45:789, pp. 685-686, as follows:

“The direct action statute does not create an absolute liability on the part of the insurer nor does it create any tort liability where none existed before. Accordingly a direct action statute does not create a right of action where no liability otherwise existed under the contract of insurance. Hence, it is necessary that the claimant be able to show a tort liability of the insured to him before he can recover from the insured’s insurer.”

Finlay v. Std. Accid. Ins. Co. (La.App. 1944), 19 So.2d 302; *Restelle v. Fidelity & Casualty Co.* (La.App. 1949), 41 So.2d 469; *Fortenberry v. Preferred Accident Ins. Co.* (La.App. 1950), 48 So.2d 657.

In *Degelos v. Fidelity & Casualty Co. of New York* (5th Cir. 1963), 313 F.2d 809, 815, the United States Court of Appeals in construing the Louisiana direct action statute stated the following rule:

“Under the Direct Action Statute, the case may proceed against the insurer, but liability depends on legal liability of the assured. Whether, as the Act permits, the assured is joined with the insurer, the standard for recovery is identical.”

Also in *Finn v. Employers Liability Assurance Corp.* (La.App. 1962), 141 So.2d 852, 864, the Louisiana court held as follows:

“The statute is remedial in character rather than substantive, and does not create causes of action.”

In *Dandridge v. Fid. & Cas. Co.* (La.App. 1939), 192 So. 887, the court held:

“The insurer is like the principal debtor, and if the claim against the insured is not well founded in law, the insurer is not liable.”

In *Wiechmann v. Huber* (Sup. Ct. Wis. 1933), 248 N.W. 112, the Supreme Court of Wisconsin held that an insurer is not liable under the Wisconsin direct action statute after the abatement by reason of death of the action against the insured. The *Wiechmann* case has not since been overruled in Wisconsin and appears to still be the present law of that state (insofar as abatement may still obtain). On two occasions the Supreme Court of Wisconsin discussed the *Wiechmann* case. In *Segal v. Ohio Casualty Co.* (Sup. Ct. Wis. 1937), 272 N.W. 665, the court stated at page 667:

“In *Wiechmann v. Huber*, . . . , the assured died before action was begun by the representative of the deceased party, and the action for wrongful death abated thereby. It was held to be ‘quite impossible to read into the statutes an intent to create a liability on the part of the insurance carrier completely dissociated from the liability of the insured,’ and plaintiff could not recover from the insurer.”

In a later case, *Kujawa v. American Indemnity Co.* (Sup. Ct. Wis. 1944), 14 N.W. 2d 31, the Supreme Court had this further comment to say about the *Wiechmann* case at page 33:

“In that case, the action was by the wife to recover damages for the death of her husband who was instantly killed in the accident while riding with Huber, the assured who died shortly after the collision. The action for wrongful death on the part of plaintiff against Huber abated with Huber’s death. It was contended that even though the liability of Huber to respond in damages abated upon his death, that nevertheless, the liability of his insurance carrier, General Casualty Company, continued as a direct and independent liability [T]he court said: ‘Under the law and facts of this case, respondent is not entitled to recover for the death of her husband against Huber, the assured because, as conceded by all concerned, her cause of action for wrongful death against him or his estate has abated. It is quite impossible to read into the statutes (secs. 85.93 and 260.11) an intent to create a liability on the part of the insurance carrier completely dissociated from the liability of the insured.’”

A further decision, involving a Missouri action, *Haines v. Harrison* (Sup. Ct. Miss. 1948), 357 Mo. 956, 211 S.W.2d 489, is pertinent. In this case the tort-feasor died and under applicable local law the action of the injured party against the tort-feasor abated. Also under the local law applicable, if the injured party had secured a judgment against the tort-feasor he could have instituted proceedings to compel the insured to satisfy the judgment to the extent of the liability in the insurance contract. There was not, however, a direct action statute in Missouri at the time of this lawsuit. In *Haines*, the injured plaintiff who did not and could not sue the deceased tort-feasor, contended that he had a right to sue the insured directly on the ground that since the condition of securing a judgment against the tort-feasor was impossible, its performance, therefore, ought not to be

required. Plaintiff also contended that securing a judgment against the tort-feasor under the "no-action" provision of the insurance policy was merely a mode of proof of loss. The court in *Haines* held that the action against the defendant insurance company could not be maintained. The court stated at 211 S.W.2d 489, 492 as follows:

"A contract of insurance, as in this case, provides that the insurer will pay, on behalf of the insured, such sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages. The contract further provides that such payments will not be made unless the conditions of the policy have been complied with. One of these conditions is that the claim must be reduced to judgment unless the insurer shall agree in writing to pay without obtaining such judgment. In this case, by the death of the insured, the cause of action was abated. The insurer can no longer pay on behalf of the insured or his estate because by law there is no liability imposed upon him or his estate. The insurer, under a contract of this nature, becomes liable to third persons through the insured. . . . We are of the opinion that since death abated the liability as to the tort-feasor it also terminated any liability in the insured's contract. Therefore, the death of the tort-feasor not only rendered it impossible to establish liability by judgment against the tort-feasor, but it ended any liability for the tort."

This case, together with the *Wiechmann* case, seem to be the sole authority for the precise issues raised in this appeal and, in the absence of contrary statutory provisions obtaining in Guam, should control on this appeal.

CONCLUSION

Causes of action for personal injury and wrongful death abate in Guam upon the death of the tort-feasor before commencement of any action against him. Neither the direct action statute in Guam, the Guam Financial Responsibility Law, nor any other provision of law in Guam create or suggest a public policy giving an injured party a direct cause of action against the tort-feasor's insurance company where the action against the tort-feasor has abated because of his death. In fact, the direct action against a tort-feasor's insurance company is wholly dependent upon the existence of a valid cause of action against the tort-feasor whether the tort-feasor is actually named or sued.

Wherefore, appellant respectfully requests that this court set aside and reverse the judgment of the lower court and direct entry of judgment in favor of appellant.

Dated at Oakland, California,
October 26, 1965.

BARRETT, FERENZ & TRAPP
WALTER S. FERENZ

Attorneys for Appellant

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WALTER S. FERENZ

Attorney for Appellant

No. 20,302

IN THE

United States Court of Appeals
For the Ninth Circuit

CAPITAL INSURANCE & SURETY COMPANY,
INC.,

Appellant,

VS.

JOHN V. KELLY as an individual, JOHN
V. KELLY as an heir to the estate of
Marjorie A. Kelly, deceased, JOHN
KELLY, a minor, and DON V. KELLY, a
minor, both heirs to the aforesaid es-
tate, by and through John V. Kelly,
their father and next friend,

Appellees.

On Appeal from the District Court of Guam for the
Unincorporated Territory of Guam

APPELLEES' BRIEF

E. R. CRAIN,
Bohn Building,
Agana, Guam,

Attorney for Appellees.

FILED

FEB 23 1966

WM. B. LUCK, CLERK

Subject Index

	Page
Statement of the case	1
Question presented	2
Argument	2
Conclusion	7

Table of Authorities Cited

Cases	Pages
Gumataotao v. Government of Guam, 322 F.2d 580 (9th Cir. 1963)	5
Perez v. Herrero, 333 F.2d 1014 (9th Cir. 1964)	5

Codes	
Guam Civil Code, Section 4	4
Guam Code of Civil Procedure, Section 4	4
Guam Government Code, Section 43354	2

Statutes	
Louisiana Revised Statutes (1960), Section 22.655	2, 3

No. 20,302

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CAPITAL INSURANCE & SURETY COMPANY,
INC.,

Appellant,

vs.

JOHN V. KELLY as an individual, JOHN
V. KELLY as an heir to the estate of
Marjorie A. Kelly, deceased, JOHN
KELLY, a minor, and DON V. KELLY, a
minor, both heirs to the aforesaid es-
tate, by and through John V. Kelly,
their father and next friend,

Appellees.

**On Appeal from the District Court of Guam for the
Unincorporated Territory of Guam**

APPELLEES' BRIEF

STATEMENT OF THE CASE

Appellees adopt the statement of the case set out
in appellant's opening brief in its entirety.

QUESTION PRESENTED

May an insurance company in Guam avoid liability for the torts of its insured where said insured died prior to the institution of action against him?

ARGUMENT

Both the trial court in its opinion and appellant in its brief have set out verbatim the Guam direct action statute, § 43354 of the Government Code of Guam. This section was inspired by a similar section in the Louisiana codes, La. R.S. (1960), § 22.655.

A general review of the laws pertaining in the various jurisdictions to direct action against insurance carriers by injured third parties and motor vehicle financial responsibility laws discloses that the law in these fields is almost as diverse as the number of states and territories under the American flag. Many states now have financial responsibility laws, some more stringent than others, with all subject to ever increasing modification toward the ultimate goal of compulsory insurance or compulsory evidence of financial responsibility. A number of jurisdictions now have statutes permitting direct action against insurance carriers by third parties, most of them limited in scope. In a few evolution has proceeded at a faster pace, and public policy has broadened in the areas in which direct action against insurance carriers operates. Louisiana, previous to Guam, has the most highly developed direct action statute, and in its pres-

ent form it is La. R.S. (1960) § 22.655. Louisiana also has had a regulatory code pertaining to insurance in effect for many years. Guam had no such code until 1962. However, when the legislature of Guam saw fit to enact into law an insurance code for Guam, it took from numerous jurisdictions ideas which it felt to be appropriate to the needs of Guam at the time, and among previously developed statutes from other jurisdictions it selected as a model the above described direct action statute of Louisiana. This is only one of many instances where the legislature of Guam has deviated from the traditional adaptation of the Guam codes to those already existing in California.

In recent years the Guam legislature has to a far greater extent struck out on its own, seeking inspiration from many jurisdictions and relying to an ever lesser degree on California. While appellees will agree with appellant and the trial court that the Guam codes, as originally adopted from California in 1933, contained no law permitting a tort to survive the death of the tort-feasor, Guam has diverged widely from California statutes and precedents since that date. In turn, where so many statutes of purely local application are being modeled upon statutes of many and divers jurisdictions, it is necessary that Guam be permitted to build its own body of precedent upon those statutes reasonably free from the influence of the courts of distant jurisdictions whose decisions do not fit the desires or needs of the residents of Guam.

It is certainly within the authority of the legislature to enact statutes pertaining to the survival of

certain causes of action. Although a few jurisdictions have enacted comprehensive statutes in this area, most have had a tendency to do it piecemeal as particular harsh or unjust aspects of the common law have been brought to the attention of the lawmakers. Where such statutes are enacted they should be construed liberally, and this is especially true in Guam where sections 4 of the Civil Code and the Code of Civil Procedure read as follows:

“§ 4. Rules of construction. The rule of common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this Territory respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice.”

Guam is an island over six thousand miles from the American mainland. It has much of the overlay of American civilization, but it also has problems that are unique to its isolated position. Over one-half of the total population in Guam represents the United States military services and their dependents, and these people and their motor vehicles crowd the island's few highways. These military people are transients in the truest sense. They come and go and they never become a part of the local scene. Their automobiles are shipped into Guam by a benevolent government and, if they so desire, they are again shipped out in the same fashion. For the most part they live inside military reservations. They are difficult to locate, and

it is virtually impossible at any time to determine whether individuals among them are still within this jurisdiction or whether they have departed. A large percentage of them are young and financially irresponsible. As to this last point, the same thing can be said of a greater percentage of the local drivers who use the highways of Guam. Obviously the legislature of Guam was aware and took action to protect the general public in the light of this overall situation. The financial responsibility law, coupled with the direct action statute, was designed to alleviate a situation which had been building up over the years as the number of motor vehicles continued to burgeon on the island roads and the number of unredressed injured persons reached ever-increasing heights.

Truly, under the circumstances, these laws must be classed as statutes of purely local application designed for local need. The District Court of Guam in this case has recognized them as such and has interpreted them within the framework of what the legislature must have had in mind, together with the actual need of the populace for these statutes.

Thus, within this context, the opinion of the trial court in this case must be scrutinized in the light of previous decisions of this Court, where, in *Gumatao v. Government of Guam*, 322 F.2d 580, 582 (9th Cir. 1963) and *Perez v. Herrero*, 333 F.2d 1014 (9th Cir. 1964), following a long-standing and consistent body of law, this Court found that in order for the decision of the trial court to be reversed there must be clear and manifest error and conclusions and in-

terpretations that are inescapably wrong and obviously erroneous.

The appellant herein has invoked the law and decisions of many jurisdictions, but none of the laws is identical to those upon which the trial court has based its decision, and especially none of them is in the same context of other law as are these applicable code sections in relation to other local law. Case law cited by appellant is only persuasive of the fact that it represents many other jurisdictions which are or may be in a different phase of evolution or development. Most of these jurisdictions are bound by more than a century of legislative and judicial tradition, whereas Guam has practically none. Guam is evolving a body of statutory law and precedents which actually stretch back for less than fifteen years. In starting afresh the Guam legislature should be able to attack its problems without restraint from unreasonable outside influence and with its particular knowledge of local needs. Likewise, the Guam courts should be able to interpret local law relatively free from influence of hide-bound decisions of more ancient jurisdictions.

In the instant case this makes good law and good sense. The defendant insurance company has admitted the responsibility of the deceased driver. Investigation discloses for the benefit of all parties that there was no question as to who was at fault in the accident. Had defendant's insured survived, without doubt defendant would have settled this claim promptly and in substantially the amount stipulated to herein. It is extremely doubtful that a casualty company takes

into its actuarial computations the possibility of an assured being killed in a given number of accidents, thereby lessening the company's exposure because of the abatement of possible actions against deceased assureds. Without doubt, if such an actuarial policy had existed, defendant in this case would have brought it forward as an additional reason to avoid liability. Where it did not, it must be assumed that no such policy existed and therefore defendant certainly lost no substantive right by being held in this case. We must assume that it received a standard premium, and to this extent it cannot claim hardship if it is required to answer according to the terms of its policy as modified and extended by local law.

CONCLUSION

The Direct Action Statute of Guam gives an injured party an immediate right of direct action against the insurer of the guilty tort-feasor which cannot be defeated by the defense of abatement on the death of such tort-feasor. The trial court properly applied the rule of liberal construction to the applicable statutes raised. Certainly if an injured person has such an immediate right of action against the insurance carrier upon the happening of the event, that right should become fixed and not defeated by the artificial intervention of the death of the tort-feasor. Both the financial responsibility law of Guam and the direct action statute were designed for the protection of the public. By law they are a part of every lia-

bility insurance policy written in Guam or applicable to Guam. Their effect should not be weakened by artificial considerations. The judgment of the trial court should be affirmed.

Dated, Agana, Guam,
February 10, 1966.

Respectfully submitted,
E. R. CRAIN,
Attorney for Appellees.

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

E. R. CRAIN,
Attorney for Appellees.

N O. 2 0 3 0 5

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ULYSEES GRANT LEEKS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

MANUEL L. REAL,
United States Attorney,
JOHN K. VAN DE KAMP,
Assistant U. S. Attorney,
Chief, Criminal Division,
J. BRIN SCHULMAN,
Assistant U. S. Attorney
Assistant Chief, Criminal Division,
PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

600 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America

FILED

DEC 9 1985

THOMAS P. JOHNSON, CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ULYSEES GRANT LEEKS,

Appellant,

.vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

MANUEL L. REAL,
United States Attorney,
JOHN K. VAN DE KAMP,
Assistant U. S. Attorney,
Chief, Criminal Division,
J. BRIN SCHULMAN,
Assistant U. S. Attorney
Assistant Chief, Criminal Division,
PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

600 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America

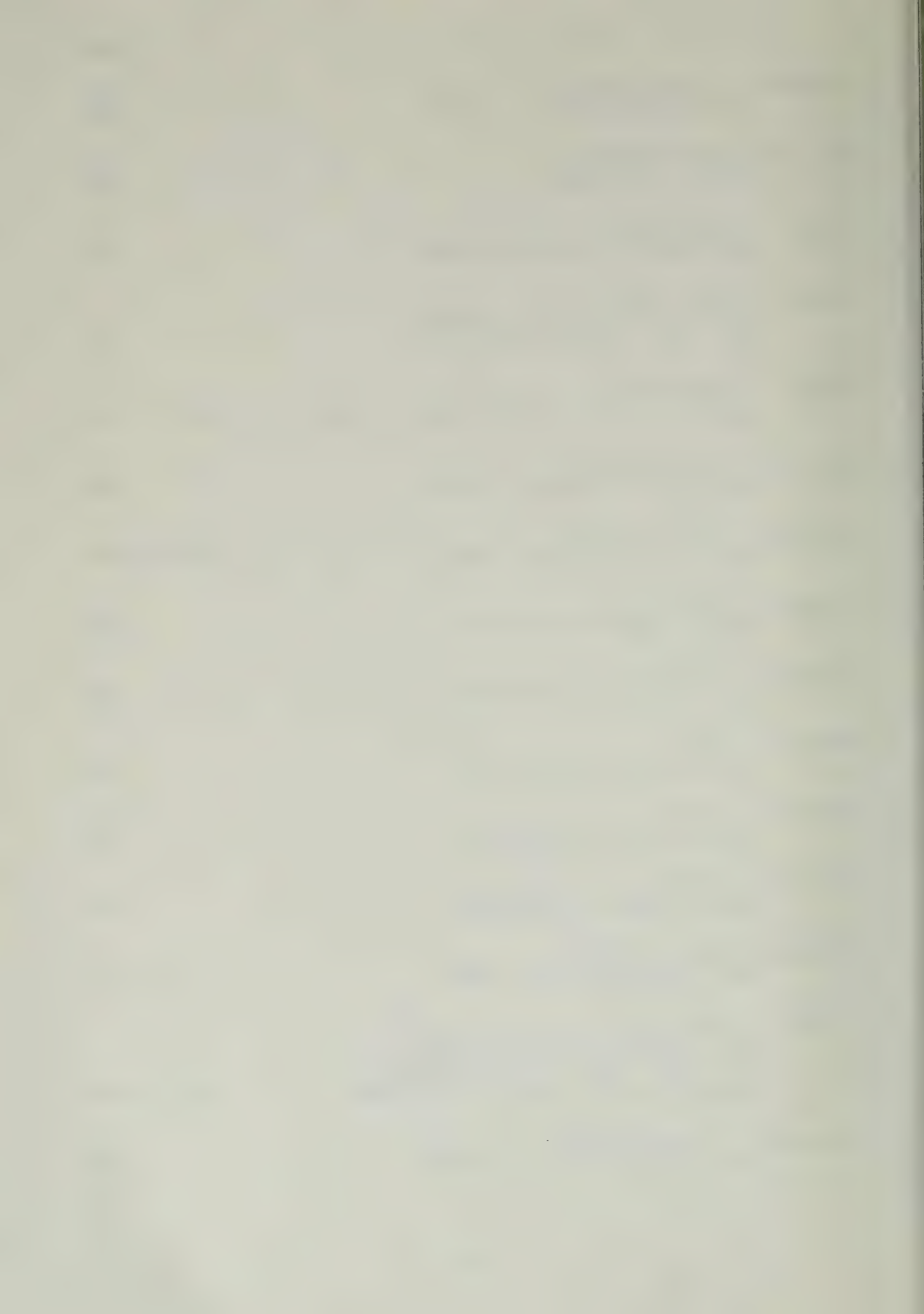
TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
I JURISDICTIONAL STATEMENT	1
II STATEMENT OF THE CASE	2
III ERROR SPECIFIED	3
IV STATEMENT OF THE FACTS	4
A. The Motion to Suppress Evidence.	4
B. The Affidavit of Alleged Bias.	7
V ARGUMENT	9
A. NO ERROR WAS COMMITTED BY PROCEEDING WITH THE TRIAL AFTER THE AFFIDAVIT OF ALLEGED BIAS WAS FILED.	9
B. THE MARIHUANA IN QUESTION WAS LAWFULLY SEIZED.	16
VI CONCLUSION	25
CERTIFICATE	26

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Ex Parte American Steel Barrel Co. , 230 U. S. 35 (1913)	10
Beecher v. Federal Land Bank, 153 F. 2d 987 (4th Cir. 1945), cert. den. 328 U.S. 871 (1946)	14
Berger v. United States, 255 U. S. 22 (1921)	9, 11, 15
Bible v. United States, 314 F. 2d 106 (9th Cir. 1963)	17
Blackford v. United States, 247 F. 2d 745 (9th Cir. 1957), cert. den. 356 U.S. 914 (1958)	21
Busby v. United States, 296 F. 2d 328 (9th Cir. 1961)	21, 24
Butler v. United States, 273 F. 2d 436 (9th Cir. 1959)	23
Chessman v. Teets, 239 F. 2d 205 (9th Cir. 1956), rev'd. on other grounds, 354 U. S. 156 (1957)	15
Craven v. United States, 22 F. 2d 605 (1st Cir. 1927), cert. den. 276 U.S. 627 (1928)	12, 14, 15
Davis v. People of the State of California, 341 F. 2d 982 (9th Cir. 1965)	24
Denton v. United States, 310 F. 2d 129 (9th Cir. 1962)	17
Eisler v. United States, 170 F. 2d 273 (D. C. Cir. 1948), writ of cert. dismissed 338 U.S. 883 (1949)	11
Ellis v. United States, 264 F. 2d 372 (C. A. D. C. 1959), cert. den. 359 U.S. 998 (1959)	20
Fernandez v. United States, 321 F. 2d 283 (9th Cir. 1963)	21

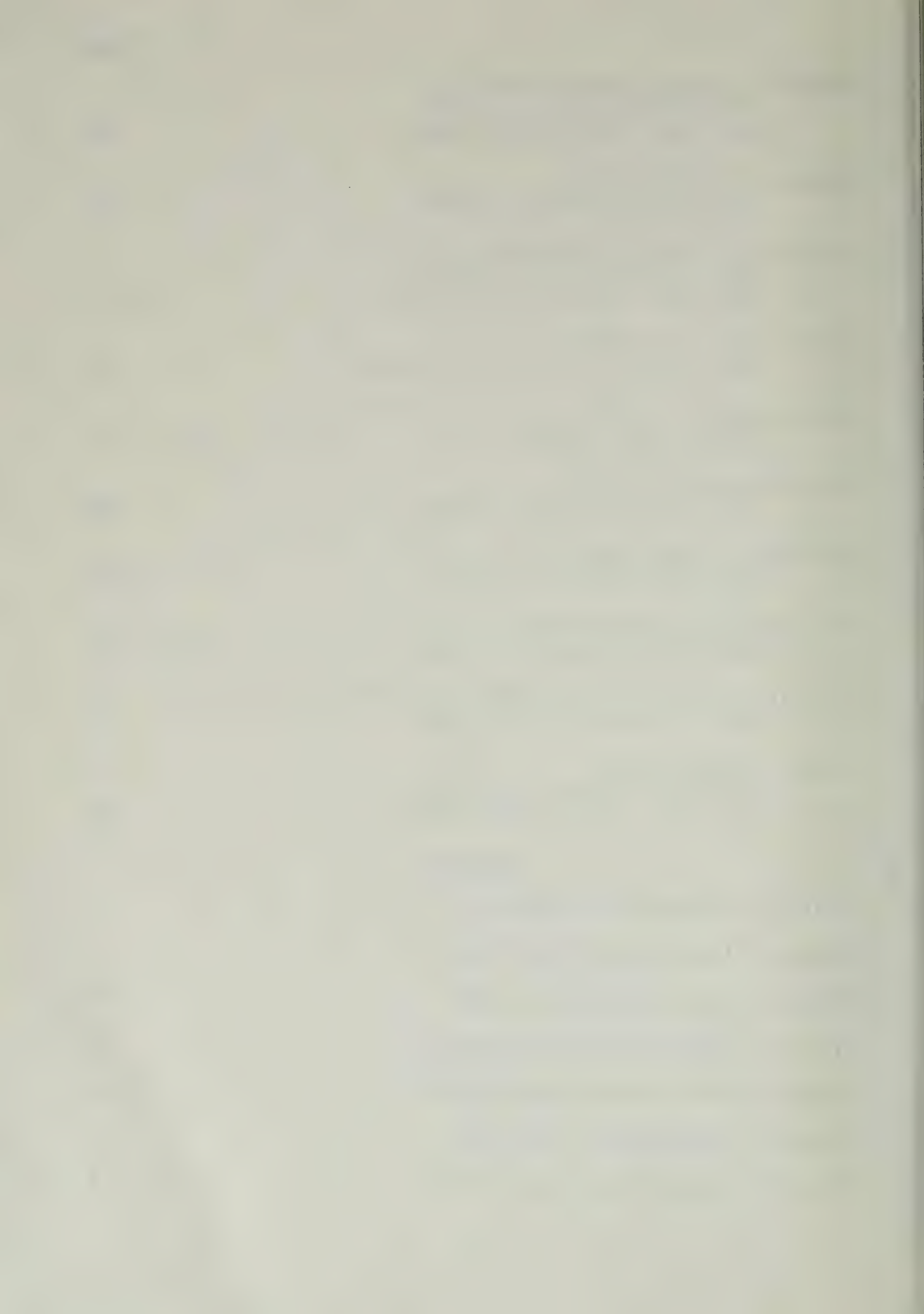
	<u>Page</u>
Gilliam v. United States, 189 F.2d 321 (6th Cir. 1951)	24
Henry v. United States, 361 U.S. 98 (1959)	21
Hurst v. United States, 344 F.2d 327 (9th Cir. 1965)	18
Jones v. United States, 326 F.2d 124 (9th Cir. 1963), cert. den. 377 U.S. 956 (1964)	18
King v. United States, 9th Circuit, No. 19,624, July 2, 1965	16, 17, 18
Morgan v. United States, 159 F.2d 85 (10th Cir. 1947)	24
Murgia v. United States, 285 F.2d 14 (9th Cir. 1960)	16, 17, 24
People v. Davis, 188 Cal. App. 2d 718 (1961)	23
People v. Ellsworth, 190 Cal. App. 2d 844 (1961)	23
People v. King, 175 Cal. App. 2d 386 (1959)	23
People v. Porter, 196 Cal. App. 2d 684 (1961)	23
People v. Sanchez, 189 Cal. App. 2d 720 (1961)	23
Plazola v. United States, 291 F.2d 56 (9th Cir. 1961)	22, 24
Price v. Johnston, 125 F.2d 806 (9th Cir. 1942), cert. den. 316 U.S. 677 (1942), rehearing den. 316 U.S. 712 (1942)	10, 13, 14
Ramirez v. United States, 263 F.2d 385 (5th Cir. 1959)	18



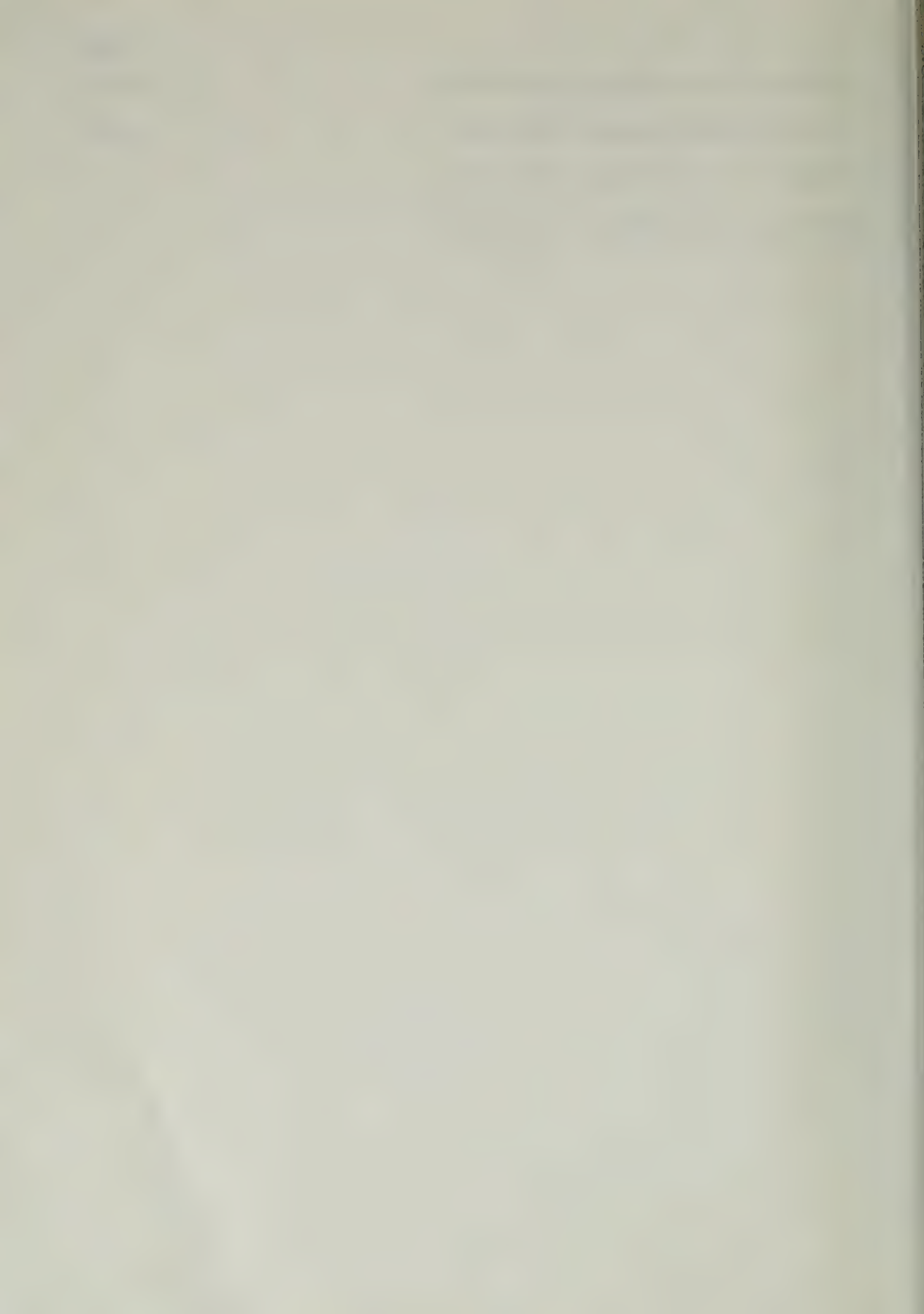
	<u>Page</u>
Refior v. Lansing Drop Forge Co. , 124 F. 2d 440 (6th Cir. 1942), cert. den. 316 U.S. 67 (1942)	14
Taylor v. United States, 179 F. 2d 640 (9th Cir. 1950)	11
In Re Union Leader Corporation, 292 F. 2d 381 (1st Cir. 1961), cert. den. 368 U.S. 927 (1961)	11, 12
United States v. Bonanno, 180 F. Supp. 71 (S.D. N.Y. 1960)	24
United States v. Di Re, 332 U.S. 581 (1948)	22, 23, 24
United States v. Gearhart, 326 F. 2d 412 (4th Cir. 1964)	24
Wilkes v. United States, 80 F. 2d 285 (9th Cir. 1935)	10, 13
Willenbring v. United States, 306 F. 2d 944 (9th Cir. 1962)	10, 11, 12
Williams v. Pierce County Bd. of Comm'rs. , 267 F. 2d 866 (9th Cir. 1959)	12
Witt v. United States, 287 F. 2d 389 (9th Cir. 1961), cert. den. 366 U.S. 950 (1961)	17

Statutes

Title 18, United States Code §2	1
Title 18, United States Code §3231	1
Title 19, United States Code §482	16, 17
Title 19, United States Code §1581	17
Title 19, United States Code §1581(a)	16
Title 21, United States Code §174	1
Title 21, United States Code §176(a)	1



	<u>Page</u>
Title 26, United States Code §7607	22, 23
Title 28, United States Code §144	9, 15
Title 28, United States Code §1291	2
Title 28, United States Code §1294	2



IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ULYSEES GRANT LEEKS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, Southern Division, adjudging appellant to be guilty as charged in all counts of a four-count Indictment, at the conclusion of trial without a jury [C. T. 2-6, 26]. ^{1/}

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2 and 3231, and Title 21, United States Code, Sections 174 and 176(a). Jurisdiction of this Court rests pursuant

^{1/} "C. T. " refers to Vol. I of the Transcript of Record. Vol. I is the Clerk's Transcript.

to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant and one Norman Dean were charged in all counts of a four-count Indictment returned by the Federal Grand Jury for the Southern District of California. Count One charged that appellant, with intent to defraud the United States, knowingly smuggled and clandestinely introduced approximately 140 pounds of marihuana into the United States from Mexico, and that Dean knowingly aided, abetted, assisted, counseled, induced, and procured the commission of that offense [C. T. 2-3].

Count Two charged that appellant, with intent to defraud the United States, knowingly concealed, and facilitated the transportation and concealment of, approximately 140 pounds of marihuana, which, as he then and there well knew, had been imported and brought into the United States contrary to law, and that Dean knowingly aided, abetted, assisted, counseled, induced, and procured the commission of that offense [C. T. 5].

Count Four charged that appellant knowingly concealed, and facilitated the transportation and concealment of, approximately fifty grams of heroin, a narcotic drug, which, as he then and there well knew, had been imported and brought into the United States contrary to law, and that Dean knowingly aided, abetted, assisted, counseled, induced, and procured the commission of

that offense [C. T. 6].

Appellant's motion to suppress evidence was heard and denied on May 20, 1965 [R. T. 3, 4, 89]. ^{2/} Appellant filed an "affidavit of bias" on the following day [C. T. 24-25].

Appellant waived trial by jury [R. T. 89]. He was tried alone. His court trial commenced on May 21, 1965, before United State District Judge Roger T. Foley. Appellant was found guilty as charged on that date [R. T. 96, 119, 190]. Thereafter, on May 26, 1965, appellant was committed to the custody of the Attorney General for fifteen years on Count One, fifteen years on Count Two, twenty years on Count Three, and twenty years on Count Four, each of the sentences to run concurrently [C. T. 26]. He thereafter filed a timely notice of appeal [C. T. 27-28].

III

ERROR SPECIFIED

The Opening Brief of appellant (p. 9) lists the following points upon appeal:

"1. The trial judge erred in proceeding with the trial of this matter after the affidavit of bias was filed.

"2. The trial judge erred in denying the Motion to Suppress and in admitting the evidence

^{2/} "R. T. " refers to the Reporter's Transcript, which consists of Volume II of the "Transcript of Record".

confiscated in the search and seizure."

IV

STATEMENT OF THE FACTS

A. The Motion to Suppress Evidence.

On March 14, 1965, United States Customs Agent Neil Greppin observed a 1961 Ford Thunderbird automobile at the parking lot of Oscar's Drive-In at San Ysidro, California, about 200 yards from the port of entry between Tijuana, Mexico and San Ysidro, California [R. T. 30-32].

The lone occupant of the Ford "faced in the direction of the Border, as if he was watching for someone coming from the Border; in other words, waiting for someone to enter the United States" [R. T. 32].

Agent Greppin, who had had about six years of experience as a Customs Agent in Southern California, sent a radio message for a registration check on the license number of the Ford. He learned that it was registered to Tucson Moore, known to Agent Greppin to be a seller of heroin and other drugs [R. T. 30, 32, 33].

While Agent Greppin was watching, appellant entered the United States from Mexico by himself in a 1959 Ford station wagon and proceeded to the north. As the station wagon came adjacent to the 1961 Ford, the latter vehicle left the parking area and pulled in behind appellant's Ford [R. T. 34].

Agent Greppin called by radio to Officers Burnett and Carter, advised them of what he had observed, including the Tucson Moore information, and requested that they "follow the vehicle until they make a determination as to what vehicle the 1961 Ford Thunderbird was following, and after they had made a determination, to use their own judgment as to stopping the vehicle" [R.T. 34, 81].

As part of Agent Greppin's experience he had learned that 1957, 1958, and 1959 Ford station wagons were used more often than other types of vehicles for smuggling from Mexico into the United States [R. T. 40, 41]. Customs Port Investigator Donald Carter observed a new registration slip on the windshield of the Ford station wagon. He testified that "from prior knowledge of vehicles being used to smuggle narcotics into the United States, this appears to be a modus operandi of how they operate. They purchase a used vehicle in that vintage or year, and this particular year vehicle is used quite frequently to smuggle narcotics." [R.T. 44-45].

Officers Burnett and Carter followed the Ford station wagon and the Ford Thunderbird. The station wagon was leading, and the two vehicles were maintaining a steady distance between each other. They "would change lanes frequently, going from one to another. Every time the station wagon would make a move from one lane to the other, the Thunderbird would make the same movement, staying approximately the same distance in back of the first vehicle." [R. T. 43-44].

The officers reached a position between the two Fords. At

a traffic light in San Diego the station wagon and the Customs officer's vehicle went through, but the Thunderbird was stopped by a red traffic light. "We observed at this time the station wagon to slow down to approximately 25 miles an hour, pull way over to the right-half side, the farther right-hand lane, and he appeared to be looking in his rear-view mirror." [R. T. 45-46]. After about a half of a mile of travel, Officer Carter "observed the Thunderbird coming at a high rate of speed, cutting in and out of traffic, and appearing to be trying to catch up with us" [R. T. 46].

"When he spotted the station wagon, then he slowed down to approximately the same speed, which was about 25 to 30 miles an hour, fell back of our vehicle, and in the same lane." [R. T. 46].

"Then the station wagon appeared to be observing the Thunderbird in back of him, and he picked up his speed to approximately 40 or 45 miles an hour again." The Thunderbird maintained the same speed and distance as before [R. T. 46].

The officers used a red light and siren to stop the station wagon at a point from 12 to 15 miles from the international border at San Ysidro [R. T. 46, 65]. The Thunderbird "slowed way down, looked at us, looked at the subject's vehicle, and then he took off at a high rate of speed, and went north on Highway 101" [R. T. 60-61]. The intention of the officers was to stop the vehicle and talk to the occupant and search the vehicle if a search was warranted [R. T. 57].

Officer Burnett identified himself to appellant. Appellant

said he was coming from San Diego. Then he said he was coming from Mexico. When asked whether he was bringing any merchandise or contraband back from Mexico, he did not answer. When asked whether he would consent to a search of the station wagon, he did not answer [R. T. 47, 85].

Officer Carter placed his hand on a door of the station wagon and smelled a very strong odor of marihuana from inside the vehicle [R. T. 47]. Appellant was then placed under arrest [R. T. 85].

Officer Carter then found packages of marihuana between the door paneling and the frame of the vehicle [R. T. 48, 74, 76]. After the vehicle was moved to an office, Customs officers found more marihuana, as well as a quantity of heroin inside the door paneling [R. T. 48, 74, 76]. The officers had neither a warrant of arrest nor a search warrant [R. T. 63-64].

During the trial which followed the motion to suppress evidence, Officer Carter testified that his experience had included an undercover narcotics, vice, and marihuana assignment with the Newport Beach City Police [R. T. 157].

B. The Affidavit of Alleged Bias.

On May 21, 1965, appellant filed an "Affidavit of Bias", alleging that the trial judge "has a personal bias and prejudice against me", giving the following grounds: "That said District Judge at the hearing of the motions to suppress in the above

entitled matter, exhibited a distain for both myself and my counsel, Frank A. St. Sure. That he seemed not to listen to the arguments of my said counsel, and that by his manner and attitude he seemed extremely prejudice and bias against myself, my counsel, and the crime of which I am charged. That on several occasions during the hearing of said motion to suppress, he made statements to my counsel indicating a prejudice and bias toward my counsel and myself." [C. T. 24-25].

The affidavit also stated that neither appellant nor his counsel had ever seen the trial judge before May 20, 1965 [C. T. 25].

Appellant claimed that the trial judge did not seem to listen to the arguments of counsel, not that he failed to listen to the testimony [R. T. 113]. Appellant's counsel had waived argument at the hearing of the motion to suppress evidence [R. T. 88-89]. He later waived closing argument during the court trial of the case [R. T. 189].

The trial judge stated:

"I assure you that I have no prejudice at all against Counsel or against his client, and I am not going to have any prejudice or feeling." [R. T. 111].

ARGUMENT

A. NO ERROR WAS COMMITTED BY
PROCEEDING WITH THE TRIAL
AFTER THE AFFIDAVIT OF ALLEGED
BIAS WAS FILED.

Appellant asserts that the trial judge committed error by proceeding with the trial after the filing of the affidavit alleging bias.

Section 144 of Title 28, United States Code, requires that a judge withdraw from a proceeding upon the filing of a "timely and sufficient affidavit" alleging bias or prejudice (emphasis added). Appellant filed an affidavit. The trial judge considered the affidavit to be insufficient and proceeded with the trial [R. T. 107, 111, 113, 119]. Appellant made no attempt to withdraw his waiver of the right to trial by jury [R. T. 89, 114].

In considering a statutory predecessor of Section 144, the Supreme Court of the United States announced the rule that "the reasons and facts for the belief the litigant entertains are an essential part of the affidavit, and must give fair support to the charge of a bent of mind that may prevent or impede impartially of judgment". (emphasis added).

Berger v. United States, 255 U.S. 22,
at 33-34 (1921).

The affidavit must state sufficient facts to support the

claim of bias.

Willenbring v. United States, 306 F.2d 944,
at 945-46 (9th Cir. 1962);

Price v. Johnston, 125 F.2d 806, at 811-12
(9th Cir. 1942), cert. denied, 316 U.S. 677
(1942), rehearing denied 316 U.S. 712 (1942).

The Supreme Court stated in discussing the earlier similar
disqualification statute:

"It is a provision obviously not applicable save in
those rare instances in which the affiant is able to
state facts which tend to show not merely adverse
rulings already made which may be right or wrong,
but facts and reasons which tend to show personal
bias or prejudice." (emphasis added).

Ex Parte American Steel Barrel Co.,
230 U.S. 35, at 43-44 (1913).

This Court has added that "These facts 'should be set out
with at least that particularity one would expect to find in a bill of
particulars filed by a pleader in an action at law to supplement and
explain the general statements of a formal pleading' ".

Wilkes v. United States, 80 F.2d 285,
at 289 (9th Cir. 1935).

The district judge may pass upon the sufficiency of the
affidavit of alleged bias.

Berger v. United States, supra, at 36;

Willenbring v. United States, supra, at 945;

Taylor v. United States, 179 F.2d 640,

at 644 (9th Cir. 1950).

"It is well settled that the trial judge has authority in the first instance to pass upon the sufficiency of the affidavit [citing cases]."

Taylor, supra, at 644.

He does not pass upon the truth or falsity of the alleged facts.

Willenbring v. United States, supra, at 945-46.

Where the showing is insufficient, it is the duty of the judge to remain in the case.

Eisler v. United States, 170 F.2d 273, at 278

(D. C. Cir. 1948), writ of cert. dismissed,

338 U.S. 883 (1949).

"There is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is."

In Re Union Leader Corporation, 292 F.2d 381,

at 391 (1st Cir. 1961), cert. denied,

368 U.S. 927 (1961).

An affidavit is not sufficient if based upon mere conclusions of bias and prejudice.

Willenbring v. United States, supra, at 946;
Williams v. Pierce County Bd. of Comm'rs.,
267 F.2d 866 (9th Cir. 1959).

There is a presumption in favor of the integrity of the trial judge.

Craven v. United States, 22 F.2d 605, at 608
(1st Cir. 1927), cert. denied,
276 U.S. 627 (1928).

"In sum, a judge must be presumed to be qualified, and there must be a substantial burden upon the affiant to show grounds for believing the contrary."

In Re Union Leader, supra, at 389.

Considering appellant's affidavit in the light of the above-mentioned principles of law, it is respectfully submitted that the affidavit falls far short of the mark. The total contents of the affidavit in regard to the alleged bias and prejudice consist of the following:

" . . . has a personal bias and prejudice against me That said District Judge at the hearing of the motions to suppress in the above entitled matter, exhibited a distain for both myself and my counsel, Frank A. St. Sure. That he seemed not to listen to the arguements of my said counsel, and that by his manner and attitude he seemed

extremely prejudice and bias against myself, my counsel, and the crime of which I am charged. That on several occasions during the hearing of said motion to suppress, he made statements to my counsel indicating a prejudice and bias toward my counsel and myself." [C. T. 24-25].

The allegation of bias against the alleged "crime" may be disregarded. The statute refers to "personal" bias.

Price v. Johnston, supra, at 811.

Thus the factual basis of the affidavit boils down to the following:

- (1) Alleged disdain for appellant and his counsel.
- (2) Assertion that the judge "seemed not to listen" to arguments.
- (3) ". . . manner and attitude. . . ."
- (4) ". . . statements . . . indicating a prejudice and bias" [C. T. 24-25].

With the possible exception of the vague assertion about seeming not to listen to arguments, all of the above claims are bald, general conclusions without any reference whatsoever to specific factual situations.

If these general statements were found to contain that particularity "one would expect to find in a bill of particulars" (Wilkes, supra), it is difficult to imagine a claim that would not satisfy the test. The assertion that the trial Judge seemed not to listen to arguments

should be considered in light of the fact that appellant waived closing argument at the hearing of the motion to suppress evidence [R. T. 88-89] and again waived argument at the conclusion of the trial [R. T. 189].

One may search the Transcript of Record, the affidavit, and the Opening Brief of Appellant in an effort to locate the source of appellant's discontent. There seemed to be some lack of mutual agreement between the court and counsel for appellant during the hearing of the motion to suppress evidence, but stretching this routine incident into a claim of bias against counsel can hardly satisfy the requirement of showing a personal bias against appellant.

The bias sought to be relieved against is a personal bias against a party or in favor of his opponent.

Price v. Johnston, supra, at 812. ^{3/}

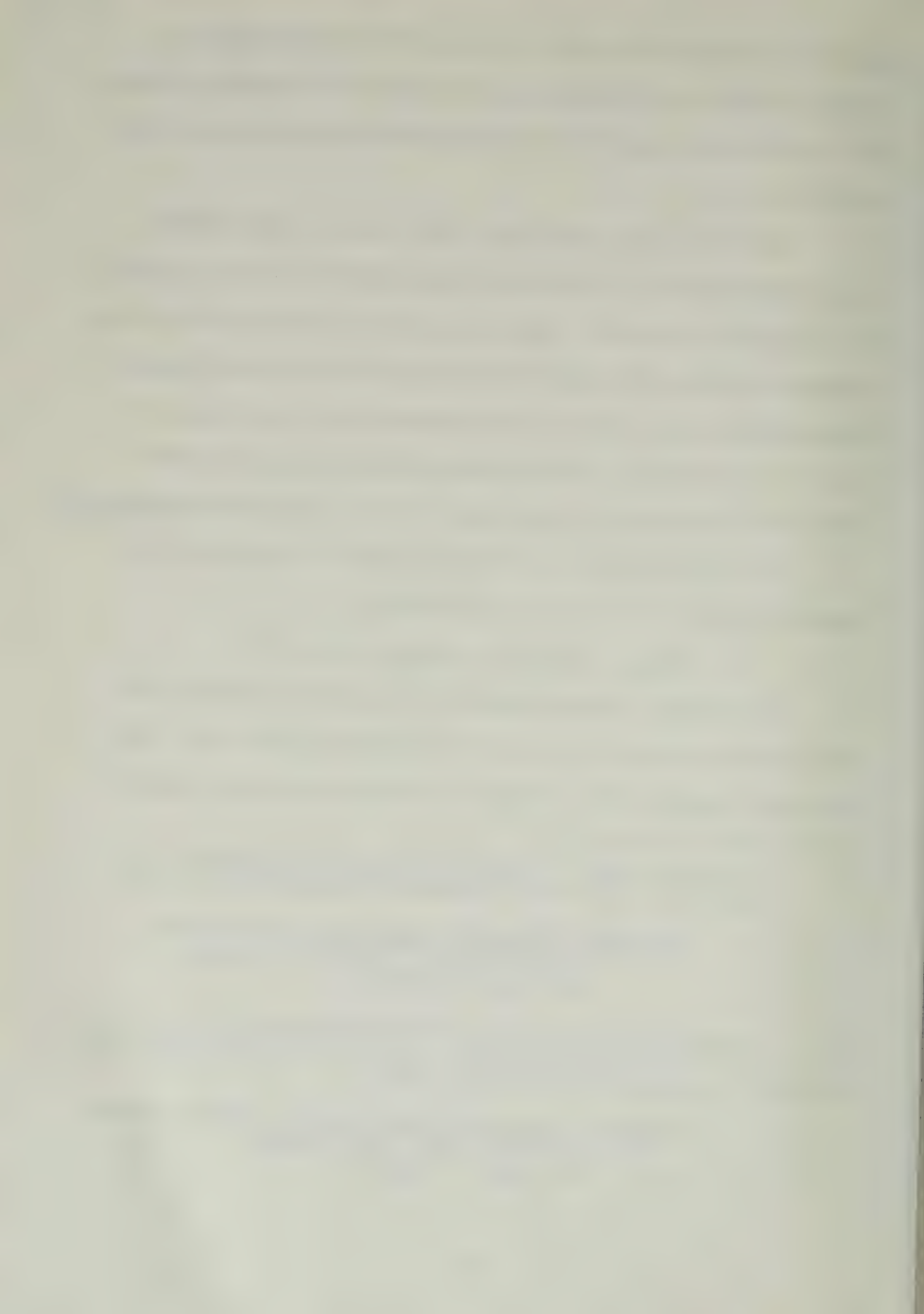
The above- quoted allegation that bias was shown by the trial judge's unquoted "statements" is very similar to the claim in Craven, supra, at 606, that the trial judge exhibited personal

^{3/} This Court found no personal bias in a trial judge's comments on the appellant's method of conducting his case".

Beecher v. Federal Land Bank, 153 F.2d 987,
at 988 (4th Cir. 1945), cert. denied,
328 U. S. 871 (1946).

The Sixth Circuit found an insufficient assertion of bias in a claim that the trial judge was the source of "remarks indicating irritation at appellant's dilatory tactics".

Refior v. Lansing Drop Forge Co., 124 F.2d 440
(6th Cir. 1942), cert. denied,
316 U. S. 67 (1942).



bias and prejudice "by questions the court asked the witnesses upon the stand". The First Circuit ruled (at p. 607):

"There is nothing in the fourth and fifth paragraphs of the affidavit. A general and epithetical charge of bias, by questions not set forth, is idle."

Craven also holds (at p. 607) that the disqualification statute does not apply where the affidavit of alleged bias is "grounded on the evidence produced in open court at the first trial, and on nothing else".

The affidavit must not be based upon facts occurring during trial.

Berger v. United States, supra, at 34.

"The conduct and rulings of the trial judge in the case itself provides no basis for an affidavit of bias or prejudice." (emphasis added).

Chessman v. Teets, 239 F.2d 205, at 215

(9th Cir. 1956), rev'd. upon other grounds,
354 U.S. 156 (1957).

In Chessman, supra, most of the reasons set forth upon the bias issue were based upon observations and rulings by the trial judge at pretrial hearings. In the instant case the alleged conduct, etc., also assertedly occurred at a pretrial hearing, so the Chessman rule should operate to preclude the use of Section 144.



For these reasons, it is respectfully submitted that the trial judge committed no error in proceeding with the trial.

B. THE MARIHUANA IN QUESTION WAS
LAWFULLY SEIZED.

Appellant attacks the legality of the seizure of approximately 140 pounds of marihuana from the vehicle which he was operating. However, his brief does not discuss the rules of border search, nor the authority to conduct searches under Title 19, United States Code, Sections 482 and 1581(a).

Section 1581(a) provides in pertinent part as follows:

"(a) Any officer of the customs may at any time go on board of any . . . vehicle at any place in the United States . . . without as well as within his district, . . . and examine, inspect, and search the . . . vehicle and every part thereof . . . and to this end may hail and stop such . . . vehicle, and use all necessary force to compel compliance."

(emphasis added).

Section 1581(a) was quoted in Murgia v. United States, 285 F.2d 14, footnote at 17 (9th Cir. 1960), in which this Court held that border searches need not be made precisely at the border. A similar result was reached in King v. United States, 9th Cir., No. 19,624, July 2, 1965, in which this Court held that the search



of the defendant's vehicle, halted by Customs officers about eight miles from the International border, constituted a border search.

This Court also has ruled that a border search does not require probable cause to arrest or search.

Murgia v. United States, supra, at 17;

Witt v. United States, 287 F.2d 389, at 391

(9th Cir. 1961), cert. denied,

366 U.S. 950 (1961);

Bible v. United States, 314 F.2d 106, at 108

(9th Cir. 1963);

Denton v. United States, 310 F.2d 129, at 132

(9th Cir. 1962).

A border search requires neither a warrant nor an arrest.

Denton v. United States, supra, at 132.

"Mere suspicion has been held enough cause for a search at the border."

Witt v. United States, supra, at 391, quoted with

approval in King v. United States, supra,

and in Bible v. United States, supra, at 108.

As this Court noted in King, supra (footnote 4), the authority for border searches appears in Title 19, United States Code, Sections 482 and 1581. Furthermore, the opinion states:

"Subdivision (d)[Section 1581] requires the driver of such a vehicle, upon direction of such an officer, to come to a stop, and authorizes pursuit if



he does not do so. "

King, supra, footnote 4.

Appellant's vehicle was stopped at a point from 12 to 15 miles from the border, as compared to about 8 miles in King, supra. In Ramirez v. United States, 263 F.2d 385 (5th Cir. 1959), a search of a vehicle at a checkpoint about 75 miles north of the Rio Grande River (hence about 75 miles from the International border) was sustained as a Customs "points of entry" search with the Court supplying the additional ground of reasonable belief by the officers that a Customs crime was being committed.

Another search a considerable distance from the border was discussed in Jones v. United States, 326 F.2d 124 (9th Cir. 1963), cert. denied, 377 U.S. 956 (1964), in which the concurring opinion of Judge Duniway stated that the search of the defendant's vehicle, which occurred at a point about 67 miles from the International border, constituted a border search under the facts of that case. This concurring opinion was cited with evident approval by this Court in Hurst v. United States, 344 F.2d 327 (9th Cir. 1965). Consequently, there does not appear to be a rigid distance limitation upon border searches, nor does any such limitation appear in the above-cited statutes upon the subject. (Appellant does not contend, of course, that any search by Customs officers at any location would necessarily constitute a border search.)

In the instant case, the officers had more than the "mere suspicion" which is sufficient cause for a border search. They had

the following information:

1. The vehicle which was ultimately searched entered the United States from Mexico and was followed by officers to the point of search (with the exception of what was apparently a few moments of time) [R. T. 34, 43-46].

2. The driver of a second vehicle had been waiting near the border as if he was waiting for someone to enter the United States [R. T. 32].

3. As the first vehicle came adjacent to the second vehicle, the latter vehicle started and pulled in behind the former [R. T. 34].

4. The operators of the two vehicles obviously attempted to keep together during a trip of from 12 to 15 miles [R. T. 43-46].

5. The second vehicle was registered in the name of Tucson Moore, a known seller of heroin and other drugs [R. T. 30, 32, 33].

6. The first vehicle was of a type "used quite frequently to smuggle narcotics" [R. T. 44-45].

7. When the officers stopped the first vehicle, the driver of Tucson Moore's vehicle observed the scene and "took off at a high rate of speed . . ." [R. T. 60-61].

After appellant was stopped, Officer Burnett acquired additional information prior to the discovery of the contraband:

8. Appellant made a false statement about coming from San Diego [R. T. 47].

9. Appellant would not reply when asked whether he



was bringing any merchandise or contraband back from Mexico [R. T. 47, 85].

10. There was a strong odor of marihuana coming from inside the vehicle [R. T. 47].

The actions of appellant and his highway companion had led experienced Customs officers to the belief that additional investigation was necessary. To the layman, unfamiliar with the modus operandi of marihuana smugglers and their hirelings, the fact that a man appeared to be watching traffic as it attempted to cross the border at San Ysidro might not be as significant as it appeared to Agent Greppin. However, to the trained and experienced Customs agent, the circumstance was sufficiently noteworthy to justify a check upon the registration of the vehicle. When it was then ascertained that the vehicle was registered to a known peddler of heroin, and when the vehicle commenced to follow another up the highway, which latter vehicle was of a type frequently used to smuggle narcotics, Agent Greppin was alerted to the need for additional action.

Although a Customs search does not require probable cause to arrest, it is significant that the action of peace officers "is not to be 'measured by what might be probable cause to an untrained civilian passerby. When a peace officer makes the arrest the standard means a reasonable, cautious and prudent peace officer.' "

Ellis v. United States, 264 F.2d 372, at 374

(C. A. D. C. 1959), cert. denied, 359 U. S. 998
(1959). (emphasis added).



In the instant case, the location was significant:

"This Court will take judicial notice of the fact that the Mexico-California border is one of the major centers for the importation of narcotic drugs into the United States."

Blackford v. United States, 247 F.2d 745, at 752
(9th Cir.1957), cert. denied, 356 U.S. 914
(1958).

Although a border search does not require probable cause, it should be noted that once the officer smelled the marihuana, there was probable cause to search the vehicle.

Fernandez v. United States, 321 F.2d 283, at 287
(9th Cir.1963).

This subsequent search resulted in the discovery of marihuana [R. T. 47, 48, 74, 76].

Appellant argues that the mere stopping of his vehicle constituted an arrest, citing Henry v. United States, 361 U.S. 98 (1959). However, as Judge Hamlin clearly emphasized in Busby v. United States, 296 F.2d 328, at 332 (9th Cir.1961), Henry is not controlling upon this question:

"Appellants' reliance on Henry v. United States is misplaced, since the prosecution in that case conceded both at trial and on appeal that the arrest took place when the car was stopped by the federal agent, i. e., the arrest took place before any contraband was



discovered and before any probable cause existed."

Appellant also cites Plazola v. United States, 291 F.2d 56 (9th Cir.1961), in support of a proposition that merely stopping a vehicle constitutes an arrest. There again it is clear that the Court does not support appellant's theory:

"Whether we agree with appellant's precise position (that his arrest was consummated when he was stopped) need not now be determined."

Plazola, supra, at 59.

This Court went on to state in Plazola that there had been an arrest by the time that the suspect had experienced a series of events which included the stopping of his vehicle, his transportation by officers for two miles, interrogation, delay, and return transportation for two miles.

Furthermore, there is good reason to believe that California law would be applicable upon the question. In United States v. Di Re, 332 U.S. 581, at 589 (1948), the Supreme Court of the United States held that "in absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity." In the instant case there is no applicable Federal statute. Appellant cites Title 26, United States Code, Section 7607, which includes authority for arrests by Customs officers and Narcotics officers under certain circumstances. Since Section 7607 does not define the term, "arrest", it is not applicable



to the question of when the arrest occurs. It is no more "applicable" than it was in Butler v. United States, 273 F.2d 436 (9th Cir. 1959), in which an arrest was made by Federal Narcotics agents. This Court referred (footnote at p. 440) to Section 7607, the same statute cited by appellant herein, and applied California arrest law after citing Di Re, supra, and one other case, to the effect that state law determines the validity of arrests without warrants, subject to such minimum standards as the Supreme Court may rule are required by the Federal Constitution (footnote at pp. 441-42).

California courts have repeatedly held that merely stopping a vehicle does not constitute an arrest.

People v. Porter, 196 Cal. App.2d 684,
at 686 (1961);

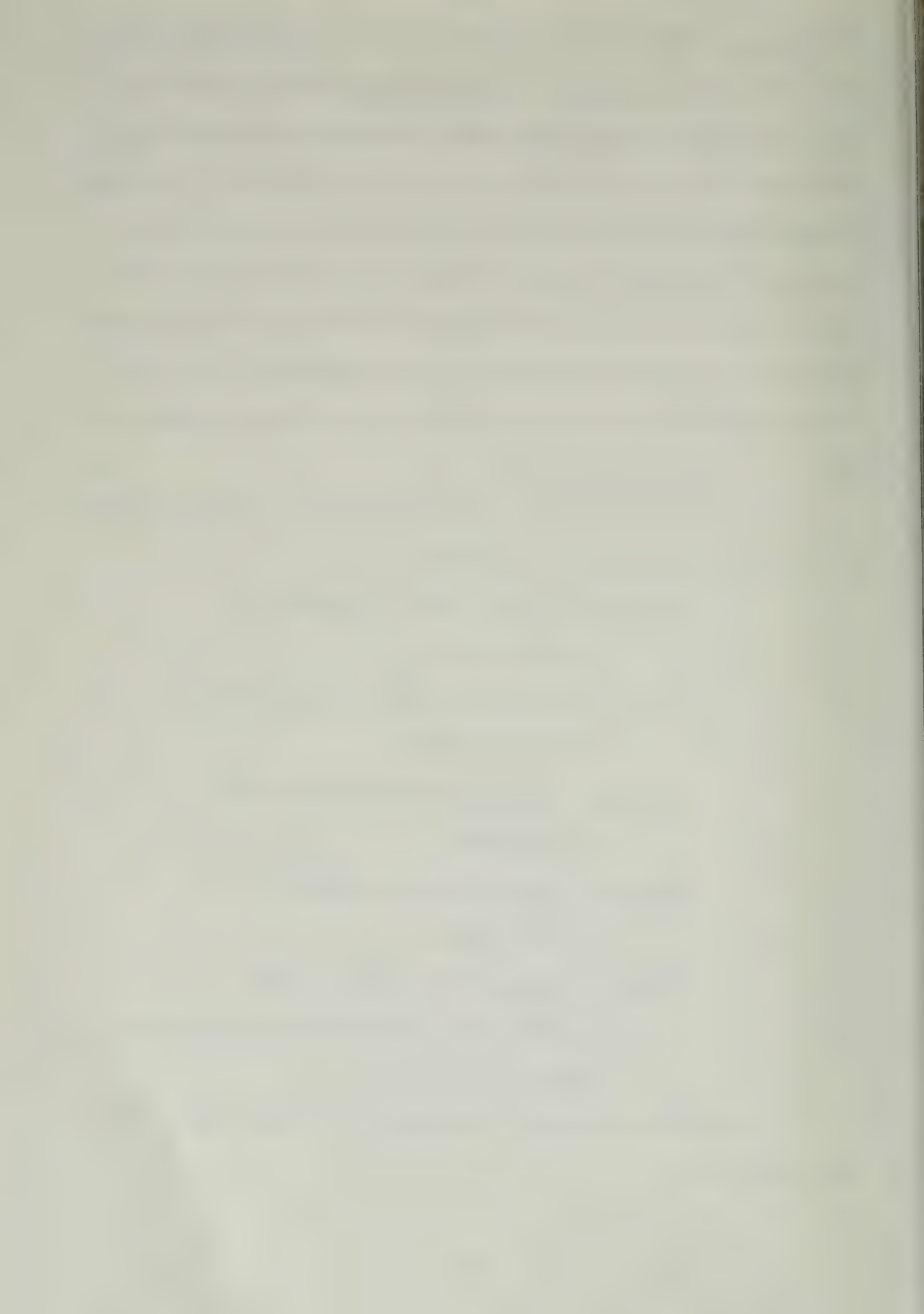
People v. Ellsworth, 190 Cal. App.2d 844,
at 846-47 (1961);

People v. Sanchez, 189 Cal. App.2d 720,
at 725 (1961);

People v. Davis, 188 Cal. App.2d 718,
at 722 (1961);

People v. King, 175 Cal. App.2d 386,
at 390 (1959) (vehicle stopped by Federal
agent).

In California an arrest requires more than a mere temporary restraint.



Davis v. People of the State of California,

341 F.2d 982, at 986 (9th Cir. 1965).

Assuming, arguendo, that Federal arrest decisions are controlling, these cases also hold that the mere stopping of a vehicle does not constitute an arrest.

Busby v. United States, supra (citing Federal cases);

United States v. Gearhart, 326 F.2d 412, at 414

(4th Cir. 1964) (citing Federal cases);

Gilliam v. United States, 189 F.2d 321, at 323

(6th Cir. 1951);

Morgan v. United States, 159 F.2d 85, at 86

(10th Cir. 1947);

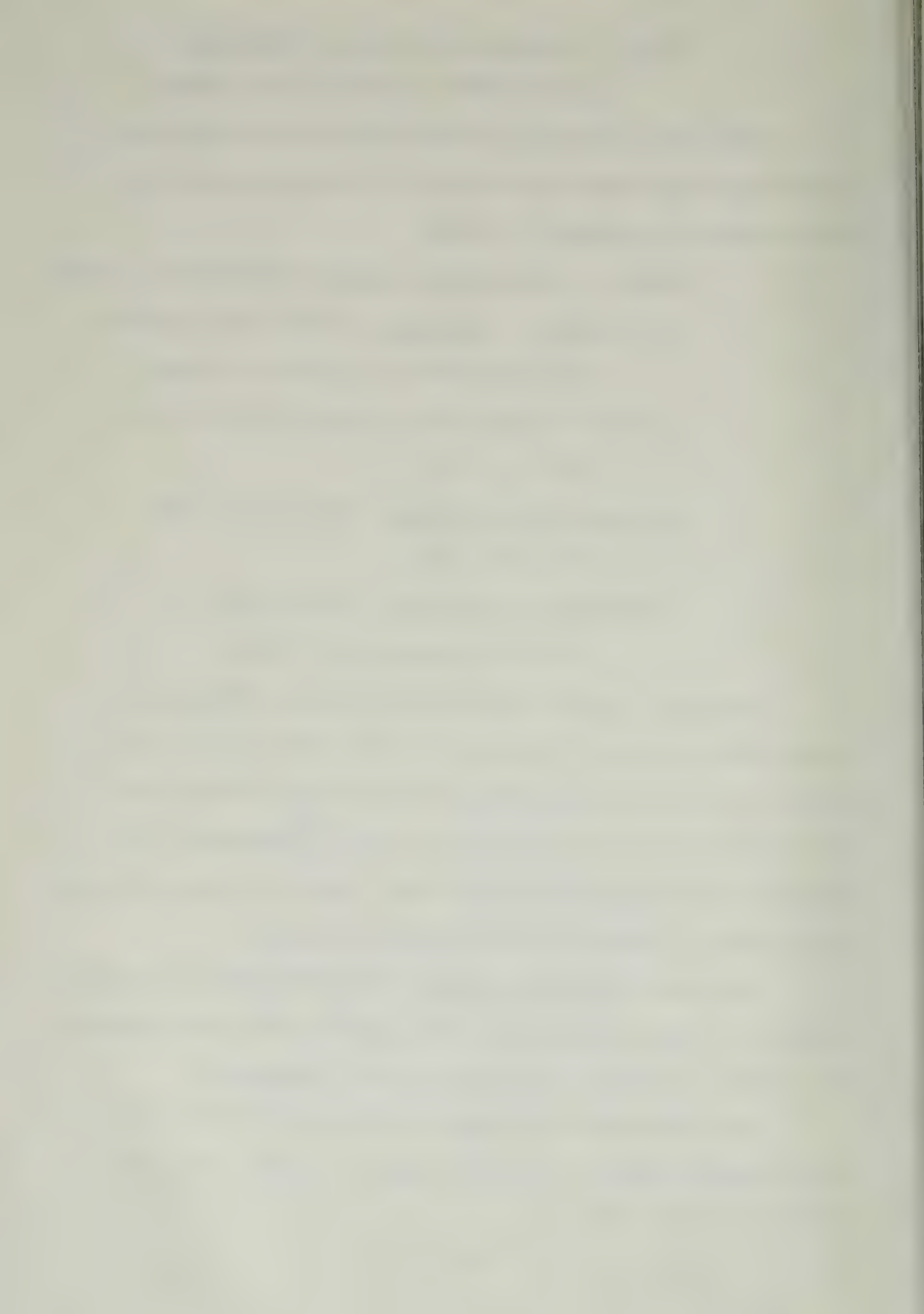
United States v. Bonanno, 180 F.Supp. 71,

at 76-81, 85 (S. D. N. Y. 1960).

In Murgia, supra, involving the stopping of the suspects' vehicle about a mile or a mile and one-half outside of Calexico, California, and the subsequent recovery of objects thrown from the vehicle, this Court held that the arrest occurred after the evidence had been recovered (at p. 18). Thus it is evident that the stopping of the vehicle did not constitute an arrest.

Appellant cites Di Re, supra, to the effect that a passenger is not deprived of his immunity from search by his mere presence in a vehicle. However, appellant was not a passenger.

Upon the subject of probable cause to arrest, appellant cites Plazola, supra. It does not appear, however, that Plazola involved a border search.



VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

MANUEL L. REAL,
United States Attorney,

JOHN K. VAN DE KAMP,
Assistant U. S. Attorney,
Chief, Criminal Division,

J. BRIN SCHULMAN,
Assistant U. S. Attorney,
Assistant Chief, Criminal Division,

PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.



CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ J. Brin Schulman
J. BRIN SCHULMAN

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES EASON,)	
)	
Petitioner-Appellant,)	
)	
v.)	No. 20303
)	
FRED R. DICKSON, Chairman,)	
Adult Authority of the State)	
of California,)	
)	
RICHARD A. McGEE, Administrator,)	
Youth and Adult Corrections Agency)	
of the State of California,)	
)	
Respondent-Appellee.)	

BRIEF OF APPELLEE

THOMAS C. LYNCH, Attorney General
of the State of California

ALBERT W. HARRIS, JR.,
Assistant Attorney General

EDWARD P. O'BRIEN,
Deputy Attorney General

6000 State Building
San Francisco, Calif. 94102
Telephone: 557-0409

Attorneys for Respondent-Appellee

FILED

FEB 1961

WM. B. LUCK, CLERK

TOPICAL INDEX

	<u>Page</u>
JURISDICTION	1
STATEMENT OF THE CASE	1
A. <u>The Complaint.</u>	2
B. <u>The Adult Authority Records</u>	2
SUMMARY OF APPELLEE'S ARGUMENT	3
ARGUMENT	
I. APPELLANT HAS FAILED TO ATTACK THE CONSTITUTIONALITY OF A STATE STATUTE	3
II. THE APPELLANT HAS FAILED TO PRESENT A SUBSTANTIAL FEDERAL QUESTION	7
CONCLUSION	13

TABLE OF CASES

	<u>Page</u>
Andrew G. Nelson, Inc. v. Jessup, 134 F.Supp. 218 (S.D. Ind. 1955)	6
Duffy v. Wells, 201 F.2d 503 (9th Cir. 1952)	12
Escoe v. Zerbst, 295 U.S. 490 (1935)	11
Ex parte Bransford, 310 U.S. 354 (1940)	5, 6
Ex parte Poresky, 290 U.S. 30 (1933)	7
In re Etie, 27 Cal.2d 753, 167 P.2d 203 (1946)	10
Nichols v. McGee, 169 F.Supp. 721 (N.D. Cal. N.D. 1959)	6
Screws v. United States, 325 U.S. 91 (1944)	8, 9
Snowden v. Hughes, 321 U.S. 1 (1943)	8, 9
U.S. Ex rel Davis v. Ragen, 154 F.2d 288 (7th Cir. 1946), cert. denied 329 U.S. 743, rehearing denied 329 U.S. 835	12
Water Service Co. v. Redding, 304 U.S. 252 (1938)	7

TEXTS, STATUTES AND AUTHORITIES

Page

United States Code

Title 28, section 2281	3
Title 42, section 1981	7
Title 42, section 1983	7

California Penal Code

Section 2924	4, 6, 7, 10
Section 3060	10

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES EASON,)	
)	
Petitioner-Appellant,)	
)	
v.)	No. 20303
)	
FRED R. DICKSON, Chairman,)	
Adult Authority of the State)	
of California,)	
)	
RICHARD A. McGEE, Administrator,)	
Youth and Adult Corrections Agency)	
of the State of California,)	
)	
Respondent-Appellee.)	

BRIEF OF APPELLEE

JURISDICTION

The jurisdiction of this Court is conferred by Title 28, United States Code section 2281 and Rule 73a of the Federal Rules of Civil Procedure which make a final order of the District Court reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

This is an appeal by a state prisoner from an order of the United States District Court for the

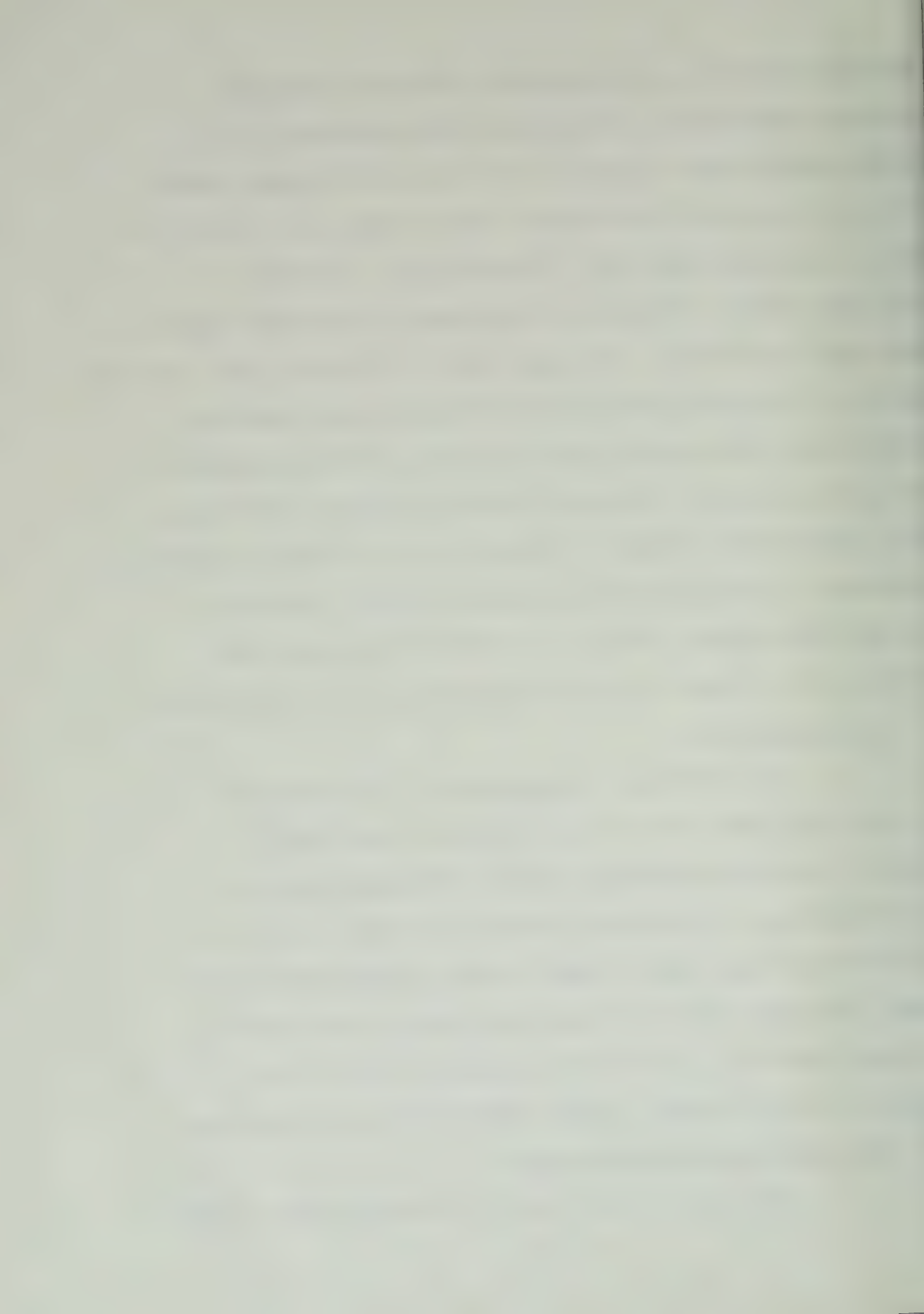
Northern District of California, Southern Division denying appellant's petition for the convening of a three-judge court to hear a civil action brought under the provisions of the Federal Civil Rights Act (Title 28 U.S.C. section 1343, and Title 42 U.S.C. sections 1981 and 1983). He seeks a permanent injunction against the Adult Authority, the Department of Corrections, and the Warden of the California State Prison at San Quentin, California, restraining said officials from proceeding to conduct parole violation hearings without affording the prisoner the right to counsel or the right to present witnesses. He also seeks compensation in the amount of \$50,000 general damages, and \$1 Million punitive damages for alleged illegal detention by the defendants.

A. The Complaint.

The principal allegation of the complaint is that the Adult Authority conducted appellant's parole violation hearing so as to deny appellant a fair hearing, in violation of section 2924 of the California Penal Code. Specifically, appellant contends that the Adult Authority deprived him of his right to present evidence, to present witnesses, and to be represented by counsel at his parole violation hearing.

B. The Adult Authority Records.

Appellant was received at the California State



Prison at San Quentin on January 13, 1947, under commitment from the Superior Court of Kern County for the offense of two counts of robbery in the first degree, in violation of section 211 of the California Penal Code. He was paroled on January 13, 1954. On December 6, 1956, his parole was suspended and his term refixed at the maximum.

On May 21, 1957, appellant was returned to the custody of the Department of Corrections as a parole violator. On September 18, 1957, at a hearing before the Adult Authority on the charge of parole violation, the appellant pled guilty to the parole violation charge and his parole was revoked.

SUMMARY OF APPELLEE'S ARGUMENT

I. Appellant has failed to attack the constitutionality of a state statute.

II. The appellant has failed to present a substantial federal question.

ARGUMENT

I

APPELLANT HAS FAILED TO ATTACK THE
CONSTITUTIONALITY OF A STATE STATUTE

Title 28, section 2281 of the United States Code lays down as one of the requirements for a three-judge court that the injunction against the officer of the state must be sought "upon the ground of the unconstitutionality

of such statute." An examination of appellant's brief reveals that appellant has not attacked the constitutionality of section 2924 of the California Penal Code. Section 2924 of the California Penal Code provides:

"Such forfeiture of credits shall not be had except upon a hearing upon the question of such violation and an adjudication by the Adult Authority that such prisoner was guilty thereof, which adjudication shall be final. The Adult Authority may hold the hearing itself or authorize a committee of officials of the prison, including the warden, to hold the hearing and make its recommendations to the authority. At any hearing such prisoner, unless outside the walls of the prison as an escapee and a fugitive from justice, shall be present and entitled to be heard and may present evidence and witnesses in his behalf."

However, appellant contends:

"The statutory requirements [of section 2924] were not complied with, so any act of the appellees revoking appellant's parole and refixing his term of imprisonment at its maximum . . . was illegal as depriving him of due process of law and of the equal protection of the law as promulgated by the California legislature with its enactment of

Section 2924, Penal Code." (AOB 6:6 - 7:2).

Appellant concludes:

"Under these rules of law, Section 2924 of the California Penal Code becomes unconstitutional in its application to appellant because in revoking appellant's parole and considering his cause for forfeiture of credits, the appellees have not complied with said statute." (AOB 8:1-6).

In regard to the necessity of a three-judge court, the United States Supreme Court in Ex parte Bransford, 310 U.S. 354, 361 (1940), has said:

"It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court. In such a case the attack is aimed at an allegedly erroneous administrative action. Until the complainant in the district court attacks the constitutionality of the statute, the case does not require the convening of a three-judge court, any more than if the complaint did not seek an interlocutory injunction."

Since appellant is in fact attacking the Adult Authority's failure to comply with the mandate of section 2924 of the California Penal Code, the injunction sought is obviously not upon the ground of the unconstitutionality of the state statute as tested by the United States Constitution. Insofar as appellant claims that he is being discriminated against because other prisoners have received all the benefits of section 2924 of the California Penal Code it is clear that such action, if improper, is so because of a wrong done by the members of the Adult Authority under the statute rather than because of the requirement of the statute itself. Where the issue is one of actual discrimination rather than the constitutionality of a state law the issue is factual and may not properly be addressed to a three-judge court. Ex parte Bransford, supra; Andrew G. Nelson, Inc. v. Jessup, 134 F.Supp. 218 (S.D. Ind. 1955); Nichols v. McGee, 169 F.Supp. 721 (N.D. Cal. ND. 1959). Since the allegedly improper action of the Adult Authority is not directly attributable to the state statute under attack, appellant's petition for the convening of a three-judge court was properly denied by the trial judge.

II

THE APPELLANT HAS FAILED TO PRESENT A SUBSTANTIAL FEDERAL QUESTION

A Federal district judge has authority, without convening a three-judge court, to dismiss for want of jurisdiction an action to enjoin the enforcement of a state statute when the cause of action does not present a substantial federal question. Ex parte Poresky, 290 U.S. 30 (1933); Water Service Company v. Redding, 304 U.S. 252 (1938).

Appellant contends that his hearing on parole violation charges was conducted under color of state law in violation of California Penal Code section 2924.

It is only the deprivation of rights derived under the federal constitution and laws which give rights to an action under sections 1981 and 1983 of Title 42, United States Code. The fact that defendants, while acting under color of other law, may have violated a state law or the state constitution, is not a basis for an action under the Federal Civil Rights Act, unless the violation results in a deprivation of some right which the appellant has under the federal constitution and laws.

"Violation of local law does not necessarily mean that federal rights have been invaded. The fact that a prisoner is assaulted, injured, or

THE
JOURNAL OF THE
ROYAL ANTHROPOLOGICAL INSTITUTE
OF GREAT BRITAIN AND IRELAND
VOLUME 100 PART 1 2000
PUBLISHED BY THE
CAMBRIDGE UNIVERSITY PRESS

CONTENTS

1. *Human evolution and the search for the 'African Eve'* 1
2. *The evolution of the human brain* 15
3. *The evolution of the human skeleton* 31
4. *The evolution of the human language* 47
5. *The evolution of the human culture* 63
6. *The evolution of the human social structure* 79
7. *The evolution of the human mind* 95
8. *The evolution of the human body* 111
9. *The evolution of the human behaviour* 127
10. *The evolution of the human environment* 143
11. *The evolution of the human population* 159
12. *The evolution of the human future* 175

even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States." Screws v. United States, 325 U.S. 91, 108 (1944).

Appellant contends in his complaint that the defendants' violation of the above mentioned statute, by conducting the hearing without allowing appellant to present witnesses and being represented by counsel, was a denial of equal protection of the laws. In Snowden v. Hughes, 321 U.S. 1 (1943), the Court, in affirming the dismissal of a complaint based on the civil rights statute, pointed out that the denial of equal protection of the laws involves more than discrimination or unequal treatment. The Court said:

"The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.

* * *

"But a discriminatory purpose is not presumed, Tarrance v. Florida, 188 U.S. 519, 520, 47 L.Ed.

472, 573, 23 S.Ct. 402, there must be a showing of 'clear and intentional discrimination,'

* * *

"A construction of the equal protection clause which would find a violation of federal right in every departure by state officers from state law is not to be favored." Snowden v. Hughes, supra at 8 and 11.

The complaint here alleges no facts which, if proved, would show a purposeful discrimination, and therefore fails to state a claim of denial of the equal protection of the laws upon which relief can be granted.

It is not alleged in the complaint to what respect the acts complained of resulted in a denial of due process of law. As previously pointed out, Screws v. United States, supra, held that the violation of local law by state officers does not necessarily mean that federal rights have been invaded, and the fact that a prisoner may be injured by state officials does not necessarily mean that the prisoner is thereby deprived of any right protected or secured by the Constitution or laws of the United States.

Therefore, even assuming the validity of appellant's allegations as set forth in the complaint, such allegations do not institute a denial of equal

protection of the laws or due process or the deprivation of any other rights of the plaintiff under the federal constitution and laws.

Furthermore, section 2924 by its very wording is applicable only to a hearing upon the forfeiture of time credits and has no application to a hearing on parole violation charges. The governing section on parole violation charges is section 3060 of the California Penal Code which provides:

"The Adult Authority shall have full power to suspend, cancel or revoke any parole without notice, and to order returned to prison any prisoner upon parole. The written order of any member of the Adult Authority shall be a sufficient warrant for any peace or prison officer to return to actual custody any conditionally released or paroled prisoner."

In construing this section, the Supreme Court of California has said:

"There is no statutory requirement that the parolee have notice or a hearing before his parole may be suspended or revoked. The authority under whose legal custody a paroled prisoner remains . . . has broad power to suspend or revoke a parole without notice." In re Etie, 27 Cal.2d

753, 758, 167 P.2d 203 (1946).

The federal courts have long acknowledged that such procedures are matters of legislative grace and that notice and hearing may be completely dispensed with without doing violation to constitutional safeguards. Escoe v. Zerbst, 295 U.S. 490 (1935). In that case, which dealt with the revocation of a suspended sentence and probation, the United States Supreme Court stated at page 492:

"In thus holding we do not accept the petitioner's contention that the privilege has a basis in the Constitution, apart from any statute. Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose." If the statute does not require a hearing, a fortiori it does not require the appearance of counsel and witnesses. Further, appellant's contention that he was denied his right to counsel and his right to confront witnesses at the parole hearing, overlooks the fact that appellant's appearance before the Adult Authority is in no sense a trial. Appellant's trial terminated upon his being convicted and sentenced; his hearing before the Adult Authority was simply an administrative proceeding to

consider his parole status and to determine what sentence within the limitation prescribed by law the appellant should be required to serve. Since such a statute does not raise constitutional issues, this Court must accept the interpretation of statutes by the highest court of the State of California. U.S. Ex rel Davis v. Ragen, 154 F.2d 288 (7th Cir. 1946), cert. denied, 329 U.S. 743, rehearing denied, 329 U.S. 835; Duffy v. Wells, 201 F.2d 503 (9th Cir. 1952). Appellant, in receiving a parole violation hearing is receiving more, not less, than the statute requires.

The complaint fails to allege any facts disclosing that the Adult Authority abused its discretion in its actions. Indeed, an examination of the documents attached to the complaint reveals that at the hearing on September 18, 1957, on parole violation charges, appellant pled guilty to the violation charged. In view of his express plea of guilty, it can hardly be contended that his parole was revoked without cause.

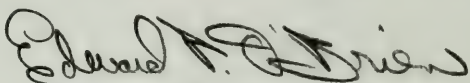
CONCLUSION

We respectfully submit that the order of the District Court should be affirmed.

Dated: February 14, 1966.

THOMAS C. LYNCH, Attorney General
of the State of California

ALBERT W. HARRIS, JR.,
Assistant Attorney General

A handwritten signature in dark ink, appearing to read "Edward P. O'Brien", written in a cursive style.

EDWARD P. O'BRIEN,
Deputy Attorney General

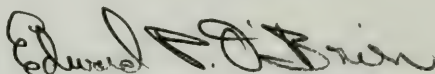
Attorneys for Respondent-Appellee

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

Dated: San Francisco, California

February 14, 1966

A handwritten signature in dark ink, appearing to read "Edward P. O'Brien". The signature is fluid and cursive, with the first name "Edward" and last name "O'Brien" clearly distinguishable.

EDWARD P. O'BRIEN
Deputy Attorney General
of the State of California

NO. 20300

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KIDDIE RIDES, INC., a
Colorado corporation,

Appellant,

-vs-

SOUTHLAND ENGINEERING, INC., a
California corporation,

Appellee.

APPELLANT'S OPENING BRIEF

SLAVITT, EDELMAN AND WEISER
8201 Beverly Boulevard
Los Angeles 48, California
OL 3-7440

Attorneys for Appellant

FILED

OCT 19 1965

FRANK H. SCHMID, CLERK

NO. 20300

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KIDDIE RIDES, INC., a
Colorado corporation,

Appellant,

-vs-

SOUTHLAND ENGINEERING, INC., a
California corporation,

Appellee.

APPELLANT'S OPENING BRIEF

SLAVITT, EDELMAN AND WEISER
8201 Beverly Boulevard
Los Angeles 48, California
OL 3-7440

Attorneys for Appellant

TOPICAL INDEX

I

Page

Statement of Jurisdiction..... 1

II

Statement of the Case..... 2

III

Specification of Errors..... 8

IV

Summary of Argument..... 9

- A. Principles of equity imply a promise to return monies had and received;
- B. An implied agreement of the contract between the parties was that defendant would repay the deposit;
- C. Allowing defendant to retain the deposit of \$19,950.00 would be to unjustly enrich him.
- D. The Trial Court erroneously interpreted and applied the holdings

in Major Blakeney Corp. v.

Jenkins, 121 Cal. App. 2d 325

263 2d 655; and Baffa v. Johnson,

35 Cal. 2d 36; 216 P 2d 13

V

Argument..... 10

TABLE OF AUTHORITIES CITED

<u>Cases</u>	<u>Page</u>
Baffa v. Johnson, 35 Cal. 2d 36 216 P 2d 13.....	9,10,23 ,24
Barkis v. Scott, 34 Cal. 2d 116, 208 P 2d 367.....	25
Bedel v. Barber, 80 Cal. App. 2d 806, 182 P 2d 591.....	22
Bennett v. Superior Court, 218 Cal. 153, 21 P 2d 946.....	16
Briggs v. Marcus Lesoine, Inc., 3 Cal. App. 2d 207, 39 P 2d 442.....	11
Cherry v. Hayden, 100 Cal. App. 2d 416, 223 P 2d 878.....	16
Churchill v. Kellstrom, 58 Cal. App. 2d 84, 136 P 2d 602.....	27
Crocker Company v. McFadden, 148 Cal. App. 2d 639, 307 P 2d 429.....	18
Dunham, Carrigan & Hayden v. Rubber Company, 84 Cal. App. . 669, 258 P 663.....	17
Fontaine v. Lacassie, 36 Cal. App.175, 171 P 812.....	11
Friedman v. Rector of St. Mathias Parish, 37 Cal. 2d 16, 230 P 2d 629.....	25,26
Glock v. Howard & Wilson Colony Company, 123 Cal.1, 55 P 713.....	24,25
Gonzalez v. Hirose, 33 Cal. 2d 213, 200 P 2d 793.....	21,28,29
Grant v. Long, 33 Cal. App. 2d 725, 92 P 2d 940.....	17

<u>Cases</u>	<u>Page</u>
Hayward Lumber v. Construction Products, 117 Cal. 221, 225 P 2d 473.....	25
Harriman v. Tetik, 56 Cal. 2d 805, 17 Cal. Rptr. 134.....	26,27
Haserot v. Keller, 67 Cal. App.659, 228 P 383.....	27
Jennings v. Bank of California, 79 Cal. 323, 21 P 852.....	17
Keller v. Hicks, 22 Cal. 457.....	16
Long-Way v. Newberry, 13 Cal. 2d 603, 91 P 2d 110.....	11
Lubeck's Investment Company v. Voris, 68 Cal. App. 652, 229 P 1025.....	12
Mahoney v. Standard GasEngine Co.,187 Cal. 399, 202 P 146.....	12
McNulty v. Lloyd, 149 Cal. App. 2d 307.....	25
Philpott v. Superior Court, 1 Cal. 2d 512, 36 P 2d 636.....	11
Rankin v. Miller, 179 Cal. App. 2d 133, 3 C. Rptr. 496.....	18
Rodriguez v. Barnett, 52 Cal. 2d 154, 338 P 2d 907.....	19,21,28
Smith v. Moynahan, 44 Cal. 53.....	17
Van Hoosen v. Briscoe, 85 Cal. App. 746, 259 P 1115.....	16

CasesPage

STATUTES

United States Code Annotated, Title 28, Sec. 1332 (a)	1
United States Code Annotated, Title 28, Sec. 1332 (c)	1,2
United States Code, Title 28, Sec. 1291.....	2
California Civil Code, § 1619.....	16
California Civil Code, § 1620.....	16
California Civil Code, § 1621.....	16
California Civil Code, § 3275.....	23,26
California Civil Code, § 3294.....	26
California Civil Code, § 1670.....	26
California Civil Code, § 1671.....	26

NO. 20300

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KIDDIE RIDES, INC., a
Colorado corporation,

Appellant,

-vs-

SOUTHLAND ENGINEERING, INC., a
California corporation,

Appellee.

APPELLANT'S OPENING BRIEF

I

STATEMENT OF JURISDICTION

The jurisdiction of the District Court was invoked upon the basis of Title 28, United States Code, Annotated, Sections 1332a1 and 1332c. Appellant, KIDDIE RIDES, INC., is a Colorado corporation, and the Appellee, SOUTHLAND ENGINEERING, INC., is a California corporation. The amount in controversy

exceeded the sum of Ten Thousand (\$10,000.00) Dollars, to-wit, a claim by the plaintiff against the defendant in the sum of Nineteen Thousand Nine Hundred Fifty (\$19,500.00) Dollars. The Complaint for an Accounting and for Money Due and Owing made the substance of allegations of jurisdiction in Paragraph I on page 1 of said Complaint; such matters were agreed to and District Court jurisdiction was stipulated in the Pretrial Conference ordered in Paragraph II thereof. The Trial Court made the findings sufficient to substantiate the claim of jurisdiction in the Findings of Fact, Paragraph 2.

This Honorable Court of Appeals has jurisdiction under 28 U.S. Code, Section 1291, enabling it to review the final judgment entered against the plaintiff below. For the sake of convenience hereinafter, the plaintiff below will be referred to as "plaintiff" and the defendant below will be referred to as "defendant".

II

STATEMENT OF THE CASE

On November 15, 1961, plaintiff and defendant executed a written Agreement wherein plaintiff was



granted a fifteen-state exclusive franchise to use, sell and merchandise certain children's rides manufactured by defendant. (Finding of Fact No. 8; plaintiff's Exhibit No. 7). Prior to November 15, 1961, defendant had a Franchise Agreement with another company, known as PALOMINO TRAILS COMPANY (hereinafter referred to as PALOMINO), concerning the same subject matter (Finding of Fact 4; plaintiff's Exhibit 2). PALOMINO had made a cash deposit of \$25,000.00 under the Agreement, and in November, 1961, \$19,950.00 of that deposit remained as a credit (Finding of Fact 6). On November 15, 1961, the agreement between PALOMINO and defendant was terminated by a written mutual agreement between those parties (Finding of Fact 7; plaintiff's Exhibit No. 6). In that same Agreement of Termination, plaintiff acquiesced in the termination, paid the sum of \$19,950 to PALOMINO, and received a credit to plaintiff from defendant in the sum of the amount paid for the deposit, to-wit, \$19,950. Page 4 of the Agreement of Termination, which is plaintiff's Exhibit No. 6, stated in part "Southland Engineering, Inc. does hereby acknowledge that it has on deposit the sum of \$19,950.00 which has hereinabove been

released by PALOMINO, and which deposit shall be credited to the benefit of KIDDIE RIDES, INC., a Colorado corporation".

On November 15, 1961, the Franchise Agreement between plaintiff and defendant, executed at the same time as the Termination Agreement, granted plaintiff the right to a 15-state exclusive franchise to use, sell and merchandise the children's ride units manufactured by the defendants. The Agreement stated in part as follows:

"The total purchase price for each unit shall be the sum of \$1,450.00 . . .

Southland hereby agrees that it will give Kiddie a credit of \$250 per unit on the first 80 units (exclusive of the 100 units heretofore ordered) sold under this Agreement, until the total sum of \$19,950 has been credited to Kiddie . . . Commencing January 1, 1962, Kiddie will place a firm order with Southland for not less than 25 units for each calendar month, or a total of 300 units per calendar year; should Kiddie fail or refuse to order said 25 units per month, or 300 units per calendar year, then and in that

event, Southland shall have the right to cancel this exclusive Franchise Agreement to the territory and grant a similar exclusive right to any other person, firm or corporation. Prior to any termination aforesaid, Southland shall give Kiddie written notice setting forth the default at such time by Kiddie, and Kiddie shall have 30 days after receipt of same within which to cure said default. If Kiddie fails to cure said default within said 30-day period, then Southland may terminate this Agreement as aforesaid. If this Agreement be terminated for any cause whatsoever, all orders placed by Kiddie prior thereto shall be filled by Southland. It is specifically agreed by and between the parties hereto that Kiddie shall not be obligated to place orders for units as aforesaid, but upon its failure to do so, Southland may terminate this Agreement as herein provided".

The Agreement did not provide for the disposition of the \$19,950.00 deposit in the event of

termination.

Between November 15, 1961, and February, 1962, plaintiff did take delivery and pay the full purchase price (\$145,000) for 100 units ordered by it pursuant to the contract (Finding of Fact No. 9). After plaintiff had ordered, received and paid for the first 100 units, it did not place any further orders, and pursuant to the rights of the contract, defendant terminated the exclusive Franchise Agreement by sending a Notice of Termination which was accepted by plaintiff (Finding of Fact 10; plaintiff's Exhibit 9). The Notice of Termination, although dated February 1, 1962, actually was sent in the latter part of April, 1962 (Finding of Fact 10).

After the termination of the Agreement, plaintiff continued to send further correspondence to defendant, requesting a further Franchise Agreement to give plaintiff the opportunity of recovering the deposit of \$19,950. As a culmination of the exchange of correspondence, a further Franchise Agreement, dated May 31, 1962, was granted by the defendant, giving plaintiff the right to sell in Texas and Arizona



at a special discount price of \$1,245.00, which price reflected the credit or discount of \$250.00. In that Franchise Agreement defendant further agreed to remit to plaintiff the sum of \$250.00, or the difference between the selling price and \$1245.00, whichever was greater, in all direct sales made by the defendant in Texas and Arizona. That Franchise Agreement was for a term of 18 months, or until plaintiff had recovered a full credit of \$20,000.00, whichever occurred first (Finding of Fact 11; plaintiff's Exhibits 10, 11, 12, 13). During the period of the Franchsie Agreement dated May 31, 1962, defendant did sell three units, and stipulated in open court that it did owe plaintiff the sum of \$750.00 at the rate of \$250.00 for each of said units (Finding of Fact 12; plaintiff's Exhibit 15).

Plaintiff filed the action below to recover the \$19,950.00. The Trial Court found that plaintiff had fully performed each and everything incumbent upon it to be performed under the terms of its Agreement with the defendant, and that plaintiff was not in default of any of its contractual duties or obligations, except that plaintiff did not qualify

for the credits set out in the November 15, 1961 Agreement (Finding of Fact 9, Paragraph 2).

III

SPECIFICATION OF ERRORS

Plaintiff asserts that the District Court committed error as follows:

1. Although the Court found that the sum of \$19,950.00 was credited by defendant to the benefit of plaintiff, and that plaintiff had performed each and everything incumbent upon it to be performed, under the terms of its Agreement, and was not in default of its contractual duties or obligations, the Court erred in finding that plaintiff had the burden of proving defendant did not suffer damages less than \$19,950.00;

2. The District Court erred in concluding that based on the Findings of Fact plaintiff failed to show it was entitled to any part or portion of the \$19,950.00 (except the \$750.00 stipulated to by the defendant);

3. The Court erred in concluding that plaintiff's right in equity to recover the \$19,950.00 was conditioned on performance of acts not required by

contract;

4. The Court erred in holding that defendant was not unjustly enriched in failing to give plaintiff any portion of the \$19,950.00, rather than the sum of \$750.00;

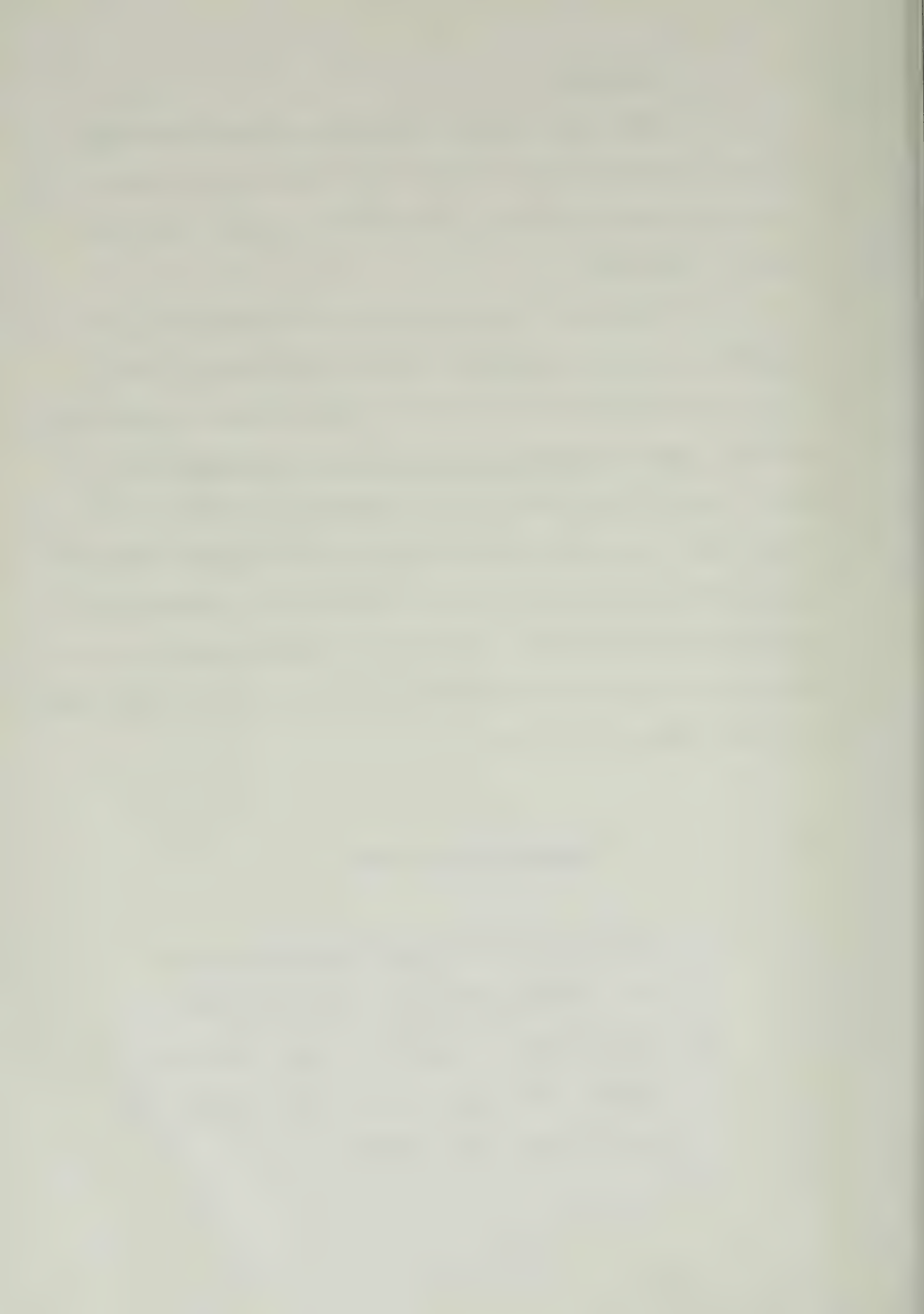
5. The Court misconstrued and misapplied the holdings and the rationale of the California cases cited in support of the Court's Conclusions of Law, No. 3, to-wit, Major Blakeney Corporation v. Jenkins, 121 Cal. App 2d 325, and Baffa v. Johnson, 35 Cal 2d 36, that under the Findings of Fact plaintiff was entitled to a Judgment for the \$19,950.00 held for plaintiff's benefit by defendant, and that the Conclusions of Law were contradictory and contrary to the results required by the Findings of Fact.

IV

SUMMARY OF ARGUMENT

A. Principles of equity imply a promise to return monies had and received.

B. An implied agreement of the contract between the parties was that defendant would repay the deposit.



- C. Allowing defendant to retain the deposit of \$19,950.00 would be to unjustly enrich him.
- D. The Trial Court erroneously interpreted and applied the holdings in Major Blakeney Corp.v. Jenkins, 121 Cal. App. 2d 325 263 P 2d 655; and Baffa v. Johnson, 35 Cal. 2d 36; 216 P 2d 13.

V

ARGUMENT

- A. Principles of Equity Imply a Promise to Return Monies Had and Received.



by PALOMINO, and which deposit would be credited to the benefit of plaintiff . . ."

The action for money had and received may be maintained whenever an equity or legal right arises from the circumstances that one person has money which he ought to pay to another. In such a case the law raises a promise on the part of the receiver of the money that he will pay it to the person entitled thereto, and that, too, without any previous request.

Mahony v. Standard Gas Engine Co., 187 Cal. 399; 202 P 146.

Where the parties by mutual consent rescinded and cancelled their contract, there was a duty to repay money received thereunder. Upon failure to do so, the person holding the money is in the position of having money in his hands for the use and benefit of another, which as such may be recovered under a common count for money had and received.

See Lubeck's Investment Company v. Voris, 68 Cal. App 652; 229 P 1025.

In the instant case, plaintiff was under no

Generally, when one person has in his possession money, which in equity and good conscience ought to be repaid to another, an equitable action for monies had and received may be maintained.

Philpott v. Superior Court, 1 Cal. 2d 512 36 P 2d, 636; See also Long-Way v. Newberry 13 Cal. 2d 603 91 P 2d 110; Fontaine v. Lacassie, 36 Cal. App. 175, 171 P 812.

"Where the defendant consents or agrees to appropriate money in his hands belonging to another to the payment of the plaintiff at the owner's request, an action for money had and received will lie."

Briggs v. Marcus-Lesoiné, Inc., 3 Cal. App. 2d 207; 39 P 2d 442.

In the instant case, defendant below consented to appropriate the money in his hands, to-wit, the \$19,950.00 deposit paid to him by PALOMINO to the payment of plaintiff under its new Agreement with the defendant. Finding of Fact No. 7 provides in part that:

"The defendant did acknowledge it had on deposit the sum of \$19,950.00 which was released

obligation to order the second 80 units to which the credit would apply, as the Agreement between the parties (plaintiff's Exhibit 6) provides on Page 3 specifically that the only remedy of the defendant was to cancel the exclusive Franchising Agreement:

"It is specifically agreed by and between the parties hereto that KIDDIE shall not be obligated to place orders for units as aforesaid, but upon its failure to do so, SOUTHLAND may terminate this Agreement as herein provided".

The parties had therefore agreed in advance as to the rights of rescission and termination on the failure to order units, although plaintiff was not obligated to place the order. In Finding of Fact 9, lines 22 to 27, the Court found that plaintiff did fully perform each and everything incumbent upon it to be performed, and that it was not in default of any of its contractual duties or obligations. Finding of Fact No. 8, lines 13 through 17, found specifically in accordance with the portion of the contract quoted above.

B. An Implied Agreement of the Contract

Between the Parties Was That Defendant
Would Repay the Deposit.

After the Termination Letter between the parties was signed (plaintiff's Exhibit 9), plaintiff, in its letter of April 6, 1962 (plaintiff's Exhibit 10) demanded of defendant that it be allowed its credit of \$250.00 per unit on a further franchise basis. On May 14, 1962, defendant's letter (plaintiff's Exhibit 11), objected to tying up an exclusive area that did not provide for future purchases, and offered to give a firm price on a certain number of units to be bought within a year. On May 16, 1962, plaintiff wrote that (plaintiff's Exhibit 12) they were rejecting the counter-proposal, and again demanded the Franchise Agreement which would give plaintiff the opportunity to recover the \$19,950.00 credit and deposit. That same letter further stated that such an arrangement would "obviate the necessity of having to make a demand for the return of \$19,950.00 in one lump sum".

On May 31, 1962, defendant sent its letter (plaintiff's Exhibit 13) to plaintiff granting a special sales price at a reduced rate for a period



of eighteen (18) months for the 80 units. The letter also provided that in the event defendant made any sales during the 18-month period, it would pay the sum of \$250.00 per unit, or the difference between the selling price and \$1245.00 per unit, whichever was the greater. This sales price and remittance would have terminated when defendant had paid back \$20,000.00 (Note: The extra \$50.00 is unexplained and irrelevant), or when the 18-month period had expired, whichever would have been sooner.

Both parties to the foregoing Letter acknowledged and agreed that plaintiff still had its credit of \$19,950.00 which was due back to it. Plaintiff solicited defendant for method of repayment, tied to reduction of purchase price, which as plaintiff stated, would eliminate the necessity of having to make a demand for the entire amount in one lump sum. Rather than pay the money back in one lump sum, defendant agreed to a Franchise Agreement and sales over an extended period as a method by which plaintiff could recover the deposit owed to it. The Franchise Agreement did not accomplish the pay-back, which was only a method of repayment, and was not a



release or forfeiture of the entire sum. In other words, the sum of \$19,950.00 was due and owing when the method of payment was agreed upon, but the agreement did not extinguish the liability to pay. At the very least, equity under the theory of money had and received would require the repayment.

See Keller v. Hicks, 22 Cal. 457; Bennett v. Superior Court, 218 Cal. 153 21 P 2d 946.

Where monies are deposited under a condition of future performance, and where the agreement and the condition are not fulfilled, the deposit should be refunded in full.

Cherry v. Hayden, 100 Cal. App. 2d 416
223 P 2d 878; Van Hoosen v. Briscoe, 85 Cal.
App. 746 259 P 1115.

A contract is either expressed or implied.
Section 1619 Civil Code of the State of California
(All references to Code provisions are those of
the State of California).

An express contract is one the terms of which are stated in words (Section 1620 C.C.) , and an implied contract is one the existence of terms of which is manifested by conduct (Section 1621 C.C.).



An implied contract is one that is inferred from the conduct, the situation, or mutual relation of the parties and enforced by the law on the ground of justice. The making of an agreement may be inferred by proof of conduct as well as by proof of the use of words.

Grant v. Long, 33 Cal. App 2d 725 92 P 2d 940;
Jennings v. Bank of California, 79 Cal 323;
21 P 852; Dunham--Carrigan & Hayden v. Rubber
Company, 84 Cal. App 669 258 P 663.

In general, an implied contract in no less degree than an express contract must be founded upon ascertained agreement of the parties to perform it, the substantial difference between the two being in the mere mode of proof by which they are to be respectively established. The law will imply that a party did make such a stipulation, as under the circumstances disclosed, he ought, upon the principles of honesty, justice and fairness to have made.

Grant v. Long, supra; Smith v. Moynahan, 44
Cal 53.

The cardinal rule in the construction of contracts is that the mutual intention of the parties as exhibited by their language, acts and conduct shall



govern. It is the objective thing manifestation of mutual consent which is essential. The law imputes to a person the intention corresponding to the reasonable meaning of his language, acts and conduct.

Crocker Company v. McFadden, 148 Cal App. 2d 639, 307 P 2d 429.

An inference that an agreement was in fact made may be based upon proof of conduct as well as upon proof of words.

Rankin v. Miller, 179 Cal. App 2d 133 3 C. Rptr. 496.

By their exchange of letters and by their conduct the parties have agreed that defendant would in effect repay to plaintiff deposit that was credited to him. In fact, it was the express intent of the parties to provide for the repayment of the sum and to recognize the indebtedness. The letters exchanged and referred to above, in the course of conduct subsequent to the termination of the original Franchise Agreement accomplished two separate things:

1. It acknowledged that upon termination of the original Franchise Agreement, the amount on deposit was not forfeited, surrendered or waived, but in

reality existed as a legal obligation of defendant;

2. If there had been any doubt as to how the \$19,950.00 deposit was to be satisfied, the parties entered into a new and further Agreement in which a method of repayment was devised.

As to the foregoing facts concerning the arrangements of the parties after the termination of the original Agreement, there is no dispute and no evidence to the contrary was introduced. The Court's Finding of Fact No. 11 likewise outlined the course of events and the subsequent Agreement of the parties.

C. Allowing Defendant to Retain the Deposit of \$19,950.00 Would be to Unjustly Enrich Him.

In Rodriguez v. Barnett, 52 Cal. 2d 154; 338 P 2d, 907, an escrow was opened for the purchase of real property wherein the buyer was not required to proceed unless he was satisfied with the subdivision map to be obtained. He had made a \$1500 deposit towards the purchase. The buyer chose not to proceed thereafter, over the objections of defendant-seller and reclaimed his deposit. The California Supreme Court stated:

"The Court found that the plaintiffs had



not refused or failed to perform any of the terms of the written Agreement; the finding is supported by the record. The plaintiff's withdrawal was made pursuant to the express provisions of the Agreement; it was therefore definitely implied in the Agreement that the defendant consented in advance to such withdrawal. Rescission extinguishes a contract. . .and requires each party to return whatever he has received as a consideration thereunder . . . as a matter of law, the plaintiff would therefore be required to return the \$1500 deposit to the plaintiff upon rescission".

The District Court recognized this equitable principle of unjust enrichment as a justifiable claim by plaintiff when stated on page 5, lines 24 through 29 of his Memorandum of Opinion:

"Plaintiff urges that defendant would be unjustly enriched if allowed to keep the credit item. Although we assume this position to be correct, the question would be, did defendant get more than fair compensa-

tion for injury received? The burden is on plaintiff to prove how much the said credit exceeds the vendor's (defendant's) damage".

Therefore, in the Trial Court's Findings was the recognition of unjust enrichment, qualified by the Court's opinion that the plaintiff had proved that the credit which would otherwise be returned was offset by damages suffered by defendant. This statement of the Court is the gravamen of the error committed below.

The Court has assumed that a set-off for damages is allowed to the defendant, although plaintiff has not in any way breached a duty or obligation. Such is clearly not the law. See Rodriguez v. Barnett, supra.

In Gonzalez v. Hirose, 33 Cal. 2d 213, 200 P 2d 793, the Court stated the proposition that relief against the forfeiture should be granted in the absence of a breach of duty. In that case the Court found in effect that no proper Notice of Default was given and that as a matter of equity there was no default and that therefore the defendant was entitled to full

equitable relief without set-off. The basic equitable principle is set forth again in Bedel v. Barber 80 Cal. App. 2d 806 182 P 2d 591, wherein it is stated that the equitable consideration for diminution of a claim refund is the failure of the claimant to perform some contractual obligation.

The cases cited herein stand clearly for the proposition that plaintiff is entitled to a refund without offset or diminution when he has not violated or breached a contractual duty or obligation. We reiterate that the Agreement of the parties, dated November 15, 1961, which is plaintiff's Exhibit 6 expressly provided that plaintiff was not obligated to order any additional units, and that the only remedy for failure to order was cancellation of the exclusive Franchise Arrangement.

The Court also made its Finding of Fact No. 9 that plaintiff fully performed each and everything incumbent upon it to be performed under the terms of this Agreement with defendant, and plaintiff was not in default of any of its contractual duties or obligations.

D. The Trial Court Erroneously Interpreted and Applied The Holdings

in Major-Blakeney Corp. v. Jenkins,
121 Cal. App. 2d 325 263 P 2d 655;
and Baffa v. Johnson, 35 Cal. 2d 36
216 P 2d 13.

In the Major-Blakeney case, plaintiff-purchaser contracted to buy ten (10) lots for \$6700. A \$1500 deposit was paid into escrow, the balance being due January 1, with time of the essence. January 1 and 2 were holidays, and plaintiff failed to pay on January 3. Hence Defendants were entitled to terminate the contract on January 6, that is, there was a violation of the condition precedent, and no evidence of waiver. But restitution may be given the purchaser who is able to show that the fault was not willful, fraudulent or grossly negligent, and that his prior payments exceed the damage suffered by the vendor (See Civil Code Sec. 3275). In the Major Blakeney case therefore, plaintiff was two weeks late as a result of the unexpected failure of his money source, and his down payment of 30% of the purchase price was too large an amount for retention as liquidating damages. The Court in that case specifically held that plaintiff was in default and that the contract

was no longer in force. Therefore, Section 3275 came into play because by its terms it affects the situation where a party to an obligation incurs a forfeiture or a loss in the nature of a forfeiture "by reason of its failure to comply with its provisions".

In Baffa v. Johnson, supra, plaintiff brought an action to recover a down payment of \$5,000 made under a written contract in which he agreed to buy defendant's cocktail lounge for \$93,000. The contract of purchase provided that if the buyer failed to deposit additional cash required in escrow, the sellers would retain the \$5,000 in liquidated damages. The finding of the Trial Court was that defendants-sellers performed all that was required of them under the contract, and that plaintiff-buyer refused to open an escrow and abandoned the contract. Plaintiff appealed from a Judgment entered in favor of the defendants. The defendants in that case sought to retain the \$5000 under the provisions of Glock v. Howard & Wilson Colony Company, 123 C 1 55 P 713, which established the principle that a vendor may retain payments as an alternative remedy to an action for damages for breach of the contract to purchase real property.

The Supreme Court, clearly overruling the Glock rule, stated that a defaulting vendee may recover part payments after further performance under the contract has terminated if he proves facts justifying relief under Civil Code Section 3275. As in the Major Blakeney case, the plaintiff seeking the recovery of his down payment was clearly in default of his obligation, and the Supreme Court denied the return of the \$5,000 down payment because plaintiff failed to prove that defendants' damages were less than the amount he had paid.

Clearly, the two cases are not authority for the instant litigation. Plaintiff seeking recovery of his deposit was not in default of any obligation or duty under his agreement with defendant, and the Trial Court so found (Finding of Fact 9). Section 3275 of the Civil Code presupposes that the party seeking relief is in default.

McNulty v. Lloyd, 149 Cal. App. 2d 307 P 2d 706;

Hayward Lumber v. Construction Products, 117 Cal 221, 255 P 2d 473;

Barkis v. Scott, 34 Cal. 2d 116, 208 P 2d 367

The application of the rule of CC § 3275 culminated in the leading case of Friedman v. Rector of St. Mathias Parish, 37 Cal. 2d 16 230 P 2d 629, which held that a defaulting vendee under a contract of purchase for real estate would be entitled to be repaid

its down payment on the property. We again emphasize that the basis of decision in the Friedman case was that the vendee was in default. The Supreme Court of California reasoned that if the only damage provision which applied was Section 3275 that restitution must be denied, but that this provision of the Civil Code taken with the other laws and policies against penalties and forfeitures was not the only alternative. To permit in effect punitive damages merely because a party had only partially performed his contract before his breach was inconsistent with Section 3294 of the Civil Code (limiting the right to exemplary damages), and Section 1670 and 1671 of the Civil Code (dealing with liquidated damages). Such penalties cannot reasonably be justified as punishment, even for one who wilfully breaches his contract. See Civil Code Section 3249, which expresses the policy of the law against the allowance of exemplary damages for breach of contract regardless of the nature of the breach. Furthermore, Section 3369 of the Civil Code provides that neither specific nor preventive relief can be granted to enforce a penalty or forfeiture in any case. See also Harriman v. Tetik, 56 Cal 2d

805, 17 Cal Rptr. 134, wherein the Court, again citing Friedman, stated that even a wilfully defaulting purchaser of real property could recover consideration paid to the extent he could show it exceeded the seller's damages. This principle extends beyond real estate transactions, and applies to a variety of situations to avoid unjust enrichment.

If indeed a forfeiture was to be declared by the acts of plaintiff, it would have occurred upon termination of the arrangements between the parties in April, 1962; however, the parties, and particularly defendant, recognized the right of plaintiff to recover his deposit through an exchange of correspondence referred to above. This exchange of correspondence resulted in the granting to plaintiff of a franchise to continue to sell the units, and a method by which plaintiff would be restored his deposit. In such circumstances, any possible forfeiture or claim of offset was waived by defendant. Forfeitures are abhorred, but waivers are favored. Churchill v. Kellstrom, 58 Cal. App. 2d 84; 136 P 2d 602. Forfeitures are not favored in the law, and any inconsistent acts or dealings by the party claiming a forfeiture will be regarded as a waiver thereof. Haserot v. Keller, 67 Cal. App. 659, 228 P 383.

In cases where plaintiff was not in default, the California Supreme Court unhesitatingly orders a

total refund. See Rodriguez v. Barnett, supra, and Gonzalez v. Hirose, supra. Therefore, the Court's legal conclusion that plaintiff had the burden of proving that defendant's damages were less than the amount of deposit was incorrect because an element of the application of such law was missing, to-wit, the finding of a breach of obligation by the plaintiff. Clearly, the plaintiff, by the findings of the Court and the evidence presented at the Trial was not in default in any of its obligations, and Section 3275 of the Civil Code did not apply. The rules of law in Gonzalez and Hirose did apply, which the Court refused to apply in the rendering of his judgment.

CONCLUSION

The Trial Court made Findings of Fact sufficient to sustain plaintiff's claim for a full refund of the deposit, and in fact compelled such a finding. The Findings were, briefly, that defendant held the sum of \$19,950.00 for the benefit of plaintiff, and that defendant was obligated to pay said sum to plaintiff; that plaintiff fully performed each and every obligation incumbent upon it to be performed under its contract with defendant, and that plaintiff was not in default or in breach of any of its agreements; that

the only remedy for failure to order additional units beyond the first 100 was the right of the defendant to terminate the exclusive franchise given to plaintiff. The Trial Court misapplied these facts by erroneously construing the Major Blakeney and Boffa decisions to mean that even though a plaintiff is not in default he must nevertheless sustain the burden of proving the extent of defendant's damages. The California Supreme Court cases of Gonzalez and Hiroz clearly are contradictory to such finding, as such principle is applicable only when the claimant is in default. The fact that defendant may have suffered damages is irrelevant and immaterial if the damages were not caused by the breach or default of plaintiff.

WHEREFORE, plaintiff prays that Judgment of the District Court entered in favor of Defendant-Appellee be reversed, and that this cause be remanded with instructions:

- (1) That the Trial Court enter Judgment in favor of plaintiff in the amount of \$19,500.00;
- (2) For plaintiff's costs of suit incurred;

- (3) For such other and further relief as to
this Court may seem just and proper.

Respectfully submitted,

SLAVITT, EDELMAN AND WEISER

By Herbert M. Weiser
HERBERT M. WEISER

Attorneys for Appellant.

C E R T I F I C A T E

I hereby certify that in connection with the
preparation of this Brief I have examined Rules 18
and 19 of the United States Court of Appeals for the
Ninth Circuit, and that, in my opinion, the foregoing
Brief is in full compliance with those rules.

Herbert M. Weiser
HERBERT M. WEISER

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)SS.

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within action; my business address is:

8201 Beverly Boulevard
Los Angeles 48, California

On October 18, 1965, I served the within APPELLANT'S OPENING BRIEF on the interested parties in said action, by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, in the United States mail addressed as follows:

MAGDLEN AND BLACKSTOCK
336 Security Building
510 South Spring Street
Los Angeles, California 90013

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on October 18, 1965, at Los Angeles, California.

Herbert M. Weiser



No. 20300

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KIDDIE RIDES, INC., a
Colorado Corporation,

Appellant,

vs.

SOUTHLAND ENGINEERING, INC.,
a California corporation,

Appellee.

APPELLEE'S BRIEF

MAGDLEN & BLACKSTOCK
JAMES C. BLACKSTOCK, and
ABE MUTCHNIK
510 South Spring Street
Los Angeles, California 90013

Attorneys for Appellee

FILED

NOV 12 1965

FRANK H. SCHMID, CLERK

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KIDDIE RIDES, INC., a
Colorado Corporation,

Appellant,

vs.

SOUTHLAND ENGINEERING, INC.,
a California corporation,

Appellee.

APPELLEE'S BRIEF

MAGDLEN & BLACKSTOCK
JAMES C. BLACKSTOCK, and
ABE MUTCHNIK
510 South Spring Street
Los Angeles, California 90013

Attorneys for Appellee

TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
APPELLEE'S BRIEF	1
STATEMENT OF FACTS AND REVIEW OF THE EVIDENCE	6
DISCUSSION	13
I THERE IS OVERWHELMING EVIDENCE, INCLUDING THE TESTIMONY OF APPELLANT'S OWN PRESIDENT, THAT THE PARTIES HEREIN EXPRESSLY CONTRACTED THAT APPELLANT COULD EARN THE \$19,950 CREDIT WHICH IS THE SUBJECT OF THIS LITIGATION ONLY BY BUYING 80 ADDITIONAL HORSE-RIDES FROM APPELLEE, AND UNDISPUTED EVIDENCE THAT APPELLANT NEVER BOUGHT EVEN ONE SUCH RIDE. ACCORDINGLY, THE DISTRICT COURT VALIDLY CONSTRUED THE CONTRACT ON THE BASIS OF THE PARTIES' OWN INTENTIONS AND PROPERLY GAVE JUDGMENT TO APPELLEE.	13
II THERE IS NO EVIDENCE WHATEVER TO SUPPORT APPELLANT'S BARE ARGUMENT THAT APPELLEE WAS "UNJUSTLY ENRICHED" BY THE TRANSACTION AT ISSUE AND OVERWHELMING AND UNCONTROVERTED EVIDENCE IN SUPPORT OF THE FINDING OF THE DISTRICT COURT THAT NO UNJUST ENRICHMENT HAS OCCURRED.	20
III ACCORDINGLY, THE FINDINGS AND JUDGMENT OF THE DISTRICT COURT, SUPPORTED BY VERY SUBSTANTIAL EVIDENCE, SHOULD BE AFFIRMED ON APPEAL.	27
CONCLUSION	32

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Bennett v. Superior Court, 218 Cal. 153	30
Boffa v. Johnson, 35 Cal.2d 36	25
Briggs v. Marcus-Lesoine, Inc., 3 Cal.App.2d 207	30
Cherry v. Hayden, 100 Cal.App.2d 416	30
Construction Machinery Co. v. Willard & Rodman, Inc., 208 Cal.App.2d 31	19
H. S. Crocker Co., Inc. v. McFaddin, 148 Cal.App.2d 639	31
Distillers Distributing Corp. v. J. C. Millett Co., 310 Fed.2d 162	27
Dunham-Carrigan-Hayden Co. v. Rubber Co., 84 Cal.App. 669	31
Fontaine v. Lacassie, 36 Cal.App. 175	29
Gonzalez v. Hirose, 33 Cal.2d 213	26
Grant v. Long, 33 Cal.App.2d 725	30
The Harriman v. Emerick, 76 U.S. 1, 19 L.Ed. 629	18
Harris v. Spinali Auto Sales, Inc., 202 Cal.App.2d 215	19
Hood v. James, 256 Fed.2d 895	19
Jennings v. Bank of California, 79 Cal. 323	31

Keller v. Hicks, 22 Cal. 457	30
Long-Way v. Newberry, 13 Cal.2d 603	29
Lubeck's Investment Co. v. Varis, 69 Cal.App. 652	29
Overman v. Loesser, 205 Fed.2d 521	27
Philpott v. Superior Court, 1 Cal.2d 512	29
Mahony v. Standard Gas Engine Co., 187 Cal. 399	29
Major -Blakeney Corp. v. Jenkins, 121 Cal.App.2d 325	25
Rankin v. Miller, 179 Cal.App.2d 133	31
Rogriguez v. Barnett, 52 Cal.2d 154	26
Reynolds v. Royal Mail Lines, 254 Fed.2d 55	28
Roebling v. Dillon, 288 Fed.2d 386	26
Smith v. Moynihan, 44 Cal. 53	31
Sterneck v. Equitable Life Ins. Co. of Iowa, 237 Fed.2d 626	19
Van Hoosen v. Briscoe, 85 Cal.App. 746	30

Statutes

Federal Rules of Civil Procedure, Rule 52(a)	6
----------------------------------------------	---

Text

The Franchise System of Distribution, Lewis, p. 30	22
----------------------------------------------------	----

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KIDDIE RIDES, INC., a
Colorado corporation,

Appellant,

vs.

SOUTHLAND ENGINEERING, INC.,
a California corporation,

Appellee.

APPELLEE'S BRIEF

Appellee Southland Engineering, Inc. respectfully files this brief in answer to the contentions made by appellant Kiddie Rides, Inc. in Opening Brief and in support of the findings and judgment of the district court.

This cause grows out of a certain franchise agreement executed by appellant and appellee, whereby appellee agreed to manufacture and appellant to buy a number of coin-in-the-slot

children's horse rides.

Previously, appellant's predecessor franchisee, Palomino Trails Company (not a party to this action), had been franchised by appellee to sell and distribute its rides in four States. Palomino had agreed to buy a minimum of 100 such rides, and to secure this obligation had deposited with appellee the sum of \$25,000, under the arrangement that Palomino could recoup this deposit at the rate of \$250 for every ride it bought from appellee.

When Palomino had purchased 20 rides, and thus had earned a credit of \$5,050 (the extra \$50 is not explained by the evidence) it was approached by appellant, who was interested in taking over Palomino's territory and other States under a new franchise agreement with appellee.

As a result of the negotiations between appellant, Palomino and appellee, the Palomino franchise agreement was terminated, and a new franchise agreement, the one at issue herein, which awarded Palomino's four States and others to appellant, was executed between appellant and appellee.

In consideration for the transfer of Palomino's franchise to appellant, appellant paid to Palomino the sum of \$19,950, the amount that Palomino still had on deposit with appellee pending Palomino's purchase of the 80 additional rides which it had contracted to buy from appellee.

Then, when appellant and appellee entered into the franchise agreement at issue (in relation to which appellant agreed to buy from appellee 300 rides per year) the parties also expressly agreed that appellant would be given a credit of \$250 on each of the first 80 rides which it thereafter bought from appellee -- thus giving appellant the opportunity, by purchasing the entire 80 rides, to earn back the full amount of its payment to Palomino for the latter's franchise rights.

However, appellant never thereafter bought a single ride from appellee.

Ultimately the parties herein mutually terminated their franchise agreement; but subsequently, as is stated in Opening Brief, page 6:

"After the termination of the Agreement, plaintiff continued to send further correspondence to defendant, requesting a further Franchise Agreement to give plaintiff the opportunity of recovering the deposit of \$19,950."

As a result, appellee executed a letter agreement which provided that appellant would be given a credit of \$250 on each ride which it thereafter sold in the States of Texas or Arizona, and which even contained a proviso that appellant would be given a credit of \$250 on each ride which appellee itself sold in the two named States. This letter agreement also contained a clause which provided that all of its conditions would terminate as soon

and the other two are in the same position.

and the other two are in the same position.

and the other two are in the same position.

and the other two are in the same position.

and the other two are in the same position.

and the other two are in the same position.

and the other two are in the same position.

and the other two are in the same position.

and the other two are in the same position.

and the other two are in the same position.

and the other two are in the same position.

and the other two are in the same position.

and the other two are in the same position.

and the other two are in the same position.

and the other two are in the same position.

and the other two are in the same position.

and the other two are in the same position.

and the other two are in the same position.

and the other two are in the same position.

and the other two are in the same position.

and the other two are in the same position.

and the other two are in the same position.

and the other two are in the same position.

and the other two are in the same position.

as appellant had earned \$20,000 in credit, or in 18 months from the date of the agreement, whichever first occurred.

However, appellant never sold even one ride in Texas or Arizona in the 18 months during which the letter agreement was extant.

(Appellee itself sold three rides in the subject States during that time and stipulated at the trial that appellant was, accordingly, entitled to a credit of \$750.)

Subsequently, after the letter agreement had been terminated by the running of its 18 month term, appellant brought suit for the entire \$19,950.

At the trial, the district court, after reviewing all the documentary and oral evidence relating to the intention of the parties in respect to the franchise agreement; including the testimony of appellant's own President (who had negotiated the deal on behalf of appellant) that he had expressly agreed that the \$19,950 credit was to be earned by appellant only by purchasing 80 additional rides at \$250 per unit (which, of course, appellant did not do); made a finding that appellant had never qualified for any credit under the provisions of the agreement (except for the \$750 stipulated to) and entered judgment for appellee merely for the \$750, with each party to bear its own costs.

In so doing, as will be shown infra, under "Discussion", the district court validly followed the fundamental rule of law

relating to the construction of a contract which has been established by recognized Federal and California case authority: -- that the provisions of a contract must be interpreted in accordance with the express intention of the parties at the time they executed the agreement.

Actually, appellant has not predicated its action for the recovery of the entire \$19,500 either on the evidence or on valid and accepted tenets of law; but merely on the contention, apparently based on pure emotion, that appellee has been "unjustly enriched" and that, in "equity and good conscience", appellant should be awarded the full \$19,950.

Yet, even assuming, arguendo, that sentimental argument can ever be substituted for valid legal principle in any litigation, still at bar there is no evidence whatever that appellee has actually been unjustly enriched; and, indeed, very substantial evidence that appellee was not -- including the undisputed evidence that appellee expended the sum of \$265,000 for raw materials, labor, engineering, etc., in order to meet its obligation of furnishing appellant and Palomino with the finished rides specified in the franchise agreements -- and thus the district court properly made a finding that no "unjust enrichment" had occurred.

Appellant has urged in Opening Brief that this Court should reverse the judgment herein with directions to the district court that it enter judgment in favor of appellant for the entire

\$19,950, as a matter of law; but appellee is confident that on the basis of the actual evidence, this Honorable Court instead will, under Rule 52 (a) of the Federal Rules of Civil Procedure and the case opinions from this Circuit construing that Rule, all cited, infra, confirm the findings and judgment of the trier of fact.

STATEMENT OF FACTS AND REVIEW OF THE EVIDENCE

At all times herein at issue appellee was the manufacturer of a certain elaborate coin-in-the-slot children's horse-ride, on which a youngster, after depositing a coin, mounted a saddled model of a pony and rode around a 10-foot oval track, behind corral type fences, for a period of time.

On December 23, 1960, appellee executed a franchise agreement with a certain partnership dba Palomino Trails Company, not a party to this action [Pltf. Exh. 2]. The contract granted Palomino the exclusive right to sell and lease appellee's ride in the States of Texas, Louisiana, Oklahoma and Arkansas.

As consideration for the franchise, Palomino agreed in the contract to purchase 100 such rides from appellee [Finding of Fact 5] at a unit price of \$1495, f.o.b. appellee's plant in Santa Monica; and to secure such purchase, Palomino deposited

with appellee the sum of \$25,000. In respect to this deposit the contract provided that Palomino would get a reduction of \$250 from the purchase price of each of the 100 rides it bought; thus enabling it to recoup the entire deposit when it had purchased the entire 100 [Finding of Fact 5].

Sometime during October 1961 [183:2-3]¹, while the Palomino agreement was still in effect (Palomino had by then purchased 20 rides against its commitment of 100) Robert Kohn (appellant's President) negotiated with Harry E. Williams, appellee's President, relative to a different franchise agreement. Kohn and Williams discussed the various States still available and then Kohn stated that he was very anxious to have Texas, because of its favorable weather and suitability for placing appellee's ride outdoors. Williams said that Texas was already committed to Palomino, but suggested that perhaps something could be worked out with Palomino in this respect [184:21 to 185:5].

Thereafter Kohn and Williams met with Scotty G. Harris, one of Palomino's partners, and ultimately Palomino agreed in writing, dated November 15, 1961 [Pl. Exh. 6] to surrender all of its franchise rights and privileges in the States of Texas,

¹

All references to the Reporter's Transcript of Proceedings are shown by a number designating the page, followed, after a colon, by the lines included.

Louisiana, Oklahoma and Arkansas.

At that time Palomino, having purchased only 20 rides, had earned only \$5, 050 against its deposit sum (there is nothing in the evidence explaining the extra \$50), leaving a balance in the deposit fund of \$19, 950 [Finding of Fact 6]; and appellant agreed in the same document to pay this sum directly to Palomino, in return for the opportunity thus made available to appellant to obtain the Texas franchise, as well as those in the other three States, originally committed to Palomino.

On the bottom of the same document Southland acknowledged that it still had on deposit a sum of \$19, 950, "which shall be credited to the benefit of Kiddie Rides, Inc., a Colorado corporation."

On the same date, November 15, 1961, appellant and appellee executed a new franchise agreement [Pl. Exh. 7] which granted appellant the exclusive "right and franchise to use, sell and otherwise deal with" appellee's rides in 15 states, including Texas and the said other three States, and wherein appellant agreed to buy 300 rides per year, 25 per month, commencing January 1, 1962 [Finding of Fact 8].

The agreement permitted appellant to buy the rides at a lower unit price than had been given to Palomino; and also obligated appellee to pay all the freight charges in shipping the rides to appellant, while Palomino had paid its own freight.

Pertaining to the \$19,950 credit sum, unearned by Palomino because of Palomino's failure to purchase the final 80 units for which it had obligated itself, appellant and appellee agreed that appellant's cost for each of the first 80 rides that it thereafter bought from appellee would be reduced by \$250; so that when appellant had purchased 80 such rides it would have earned a full credit of \$20,000 (or, to be exact, \$19,950) [Finding of Fact 7]. In this respect, paragraph 4 of the November 15 franchise agreement provided, inter alia, as follows:

" . . . Southland hereby agrees that it will give Kiddie a credit of \$250 per unit on the first 80 Units (exclusive of the 100 Units heretofore ordered) sold under this Agreement, until the total sum of \$19,950 has been credited to Kiddie)."

(The "100 Unit" order referred to involved a separate transaction between the parties, in nowise related to the purchase of the 80 rides specifically enumerated in the instant agreement, whereby appellant had bought and paid for a separate 100 rides.)

Appellant never thereafter purchased a single one of the 80 rides specified in the agreement [86:24 to 87:2; and Opening Brief, p. 6: ". . . plaintiff did not place any further orders"].

Then, in December 1961, President Kohn notified appellee that appellant would not be able to buy any rides, for financial reasons [81:12-15].

By that time appellee had already expended \$265,000 for raw materials, labor, tooling, engineering, etc., to make it possible for appellee to manufacture the rides contracted for by appellant and by Palomino [Finding of Fact 14; 91:22 to 92:3; and 94:21 to 95:2].

Subsequently, because appellant had failed to purchase any rides under the franchise agreement, appellee sent to appellant a letter notice of default and termination of agreement [Pltf. Exh. 9], which informed appellant of its default in failing to order rides as provided in the agreement and further stated that if appellant did not cure this default: "the [franchise] agreement will terminate as of March 1, 1962, and thenceforth will be of no force and effect."

On the bottom of this notice, President Kohn, on behalf of appellant, affixed his signature to the following paragraph:

"KIDDIE RIDES INC. does hereby accept
the above notice of default, and does hereby
acknowledge that said exclusive Franchise
Agreement terminated as of March 1, 1962

Dated March 2, 1962"

"After the termination of the Agreement, plaintiff continued to send further correspondence to defendant, requesting a further Franchise Agreement to give plaintiff the

opportunity of recovering the deposit of \$19,950" [Opening Brief, p. 6].

As a result of this correspondence, appellee executed a letter agreement dated May 31, 1962 [Pltf.Exh. 12] which provided appellant with another opportunity to earn full credits against the \$19,950 sum, by permitting appellant to sell up to 80 rides in Texas and Arizona, each of which it could purchase from appellee for \$250 below the regular price. Moreover, the agreement even specified that appellant would be paid \$250 for each ride which appellee itself sold in those two states [Finding of Fact 11]. This agreement concluded with the following paragraph:

"It being further understood, that said special sales price and remittance will terminate when Southland has remitted to Kiddie Rides, Inc., the sum of \$20,000 or the expiration of the period of 18 months, which ever event occurs first."

At the expiration of the 18 month period, December, 1963, appellant had not bought even one ride from appellee; and appellee had sold three in the States provided for [Finding of Fact 12].

Thereafter, on March 2, 1964, appellant filed its Complaint in common count, for "an accounting and for money due and owing", in which it prayed for judgment for the entire

sum of \$19,950.

Trial on the action was held on February 16 and 17, 1965, before the court sitting without a jury, and during the proceedings President Kohn specifically testified, on behalf of appellant, that he had expressly agreed, at the time that the franchise agreement of November 15, 1961 was executed by the parties herein, that the \$250 per unit credit provided for in the agreement (to a total of \$19,950 for 80) was only intended to apply against the next 80 rides subsequently to be purchased by appellant (but not one of which appellant ever thereafter bought) [195:1 to 196:18].

At the conclusion of the trial the district court found that: ". . . the plaintiff did not qualify for the credits set out in the November 15, 1961 agreement" [Finding of Fact 9] and gave judgment to appellant only for the sum of \$750 -- to which sum counsel for appellee stipulated that appellant was entitled under the May 31, 1962 letter agreement: appellee having sold three rides in Texas during the term of the May 31 agreement [Finding of Fact 12 and Judgment].

Thereafter, appellant gave notice of appeal, contending that it was entitled to recover the full \$19,950 sum, and that therefore the judgment was in error.

At the same time, the other side of the coin is that

the government has a responsibility to ensure that

the public is properly informed about the risks

of the various options available to them.

It is also important to ensure that the public

is not misled by the media or by interest groups.

The government should also ensure that the public

is not overwhelmed by the complexity of the issues.

Finally, the government should ensure that the public

is not misled by the media or by interest groups.

It is also important to ensure that the public

is not overwhelmed by the complexity of the issues.

The government should also ensure that the public

is not misled by the media or by interest groups.

Finally, the government should ensure that the public

is not overwhelmed by the complexity of the issues.

The government should also ensure that the public

is not misled by the media or by interest groups.

It is also important to ensure that the public

is not overwhelmed by the complexity of the issues.

The government should also ensure that the public

DISCUSSION

I

THERE IS OVERWHELMING EVIDENCE, INCLUDING THE TESTIMONY OF APPELLANT'S OWN PRESIDENT, THAT THE PARTIES HEREIN EXPRESSLY CONTRACTED THAT APPELLANT COULD EARN THE \$19,950 CREDIT WHICH IS THE SUBJECT OF THIS LITIGATION ONLY BY BUYING 80 ADDITIONAL HORSE-RIDES FROM APPELLEE, AND UNDISPUTED EVIDENCE THAT APPELLANT NEVER BOUGHT EVEN ONE SUCH RIDE. ACCORDINGLY, THE DISTRICT COURT VALIDLY CONSTRUED THE CONTRACT ON THE BASIS OF THE PARTIES' OWN INTENTIONS AND PROPERLY GAVE JUDGMENT TO APPELLEE.

After a thorough and complete trial on the merits, the district court found that appellant is not entitled to recover the sum of \$19,950 for which appellant sued appellee (and only the \$750 stipulated to by appellee) because the parties themselves had contracted that the larger sum could only be earned by appellant by the purchase from appellee of 80 additional children's rides (at the rate of \$250 per ride), and appellant never purchased any of these rides.

And there is substantial, actually overwhelming, evidence, both oral and documentary, in support of this finding and the ensuing judgment that appellant take only the stipulated to \$750.

Harry E. Williams, appellee's president, testified as follows [118:16 to 119:6]:

"The Witness: My understanding of the whole thing was that the deposit was put up by Palomino Trails prior to my taking over the company on a firm order of 100 machines. Mr. Kohn [appellant's president] negotiated for 100 machines separate from Palomino, it had nothing to do with Palomino Trails. It was a separate transaction. Subsequently he wanted Texas and he negotiated with Palomino Trails to take Texas, and I assume the same thing he did, that he was taking over Palomino Trails' position and that position clearly stated and my understanding clearly was that it was to get the refund of \$250.00 per machine on a \$1,495.00 machine and had nothing to do with the new price I gave him on his 100 machines.

"The Court: All right.

"The Witness: That is my understanding of the whole thing. Had he purchased the other 80 machines he would have received his \$250.00 deposit [on each]."

Indeed, Robert Kohn, appellant's own president, himself testified that the parties had agreed to apply the

\$19,950 "deposit" against machines purchased after the initial 100; as follows [195:1 to 196:18]:

"The Witness: Now, the last conversation then was in Mr. Williams' office between Mr. Williams and myself, where he stated: '...why don't you be a good guy and why don't you agree to recoup or recover this credit on horses purchased after the first 100 horses and not on your original purchase [of 100]. . .?'

"I don't know why the hell I did it --

"Q. Don't comment on it. A. Pardon me sir.

"Q. Just say what was said. A. But I agreed.

"Q. You agreed? A. I agreed. I agreed with Mr. Williams at that point, because we were all thinking, Mr. Williams was thinking, I was thinking that the purchases would run two, three, four hundred ***

"And as I pointed out, the very last conversation just before I left was I agreed that we wouldn't demand the return of our deposit, this advance deposit which was to be credited to us until purchases after the first 100, and the contracts were so drafted."

And the actual agreement executed by the parties on November 15, 1961 [Pltf. Exh. 7] contains the following language in Paragraph 4:

" . . . Southland hereby agrees that it will give Kiddie a credit of \$250.00 per Unit on the first 80 Units (exclusive of the 100 Units heretofore ordered) sold under this Agreement, until the total sum of \$19,950 has been credited to Kiddie . . . "

Other evidence further showed that later; after appellant had committed an anticipatory breach of the foregoing agreement, by notice to appellee that appellant did not intend to purchase the other 80 rides, and the parties had mutually terminated the agreement in writing by a document dated February 1, 1962; appellant again desired an opportunity to earn the \$250 credit against 80 additional units.²

2

As appellant itself describes this situation in its Opening Brief, page 6:

"After the termination of the Agreement, plaintiff continued to send further correspondence to defendant, requesting a further Franchise Agreement to give plaintiff the opportunity of recovering the deposit of \$19,950." (Emphasis added.)

Then the parties mutually agreed, by a letter dated May 31, 1962, that appellant would get such a \$250 credit against 80 rides, either by purchasing them outright at a price reduced by \$250 per unit, or from sales of such rides by appellee itself in the States of Texas and Arizona. The letter, [Pltf. Exh. 13] executed by appellee's president Williams, provided as follows:

"Southland hereby grants to Kiddie Rides, Inc., for a period of 18 months a special sale price of \$1245.00 per unit for the next 80 units of Western Trails Traveling Pony sold in the States of Texas and/or Arizona.

"In the event that Southland makes any sales of Western Trails Traveling Pony Units, other than to Kiddie Rides, Inc. in the States of Texas or Arizona during said 18 month period, it will remit to Kiddie Rides, Inc. the sum of \$250.00 per unit or the difference between its selling price and \$1245.00, whichever is the greater. Sales taxes and freight charges are not to be included in the above calculations.

"It being further understood, that said special sales price and remittance will terminate when Southland has remitted to Kiddie Rides, Inc. the sum of \$20,000.00 or the expiration of the period of 18 months, whichever event occurs first."

The evidence is undisputed that when the 18 month period provided in this supplemental agreement had run (and the agreement thus terminated) appellant itself had not purchased a single ride and appellee had sold three in Texas -- thus entitling appellant to the credit of \$750 stipulated to, but no more.

It is settled law, by both Federal and California case authority, that a court, in construing a contract between litigating parties, is obliged to determine the actual intention of the parties when they executed the agreement and to give credence to this intention.

On the basis of the foregoing evidence clearly establishing that the parties herein intended by their agreement that appellant was to earn credits against the \$19,950 sum only by purchasing additional rides -- which evidence includes the testimony of appellant's own president -- and on the undisputed evidence that appellant never then bought even one such ride -- it is manifest that the findings and judgment of the district court are entirely correct and proper; and it is likewise patently evident that if the court had ruled as appellant is contending it should have: - that appellant may recover the \$19,950 without having purchased the additional rides -- this would fly squarely in the face of the parties' own express agreement and would be erroneous under law.

In the Harriman v. Emerick, 76 U.S. 1, 19 L.Ed. 629, the Supreme Court said, at page 633:

" . . . It is the province of courts to enforce contracts - not to make or modify them."

And in Sterneck v. Equitable Life Ins. Co. of Iowa, 237 F.2d 626 (8 Circ. 1956) it is said, at page 629:

" . . . A contract that is plain and unmistakable in its terms may not be rewritten by a court to conform to what one of the parties may have thought the contract ought to be."

Also in accord: Hood v. James, 256 F.2d 895, (5 Cir. 1958) at page 903.

Similarly, under California law, see Harris v. Spinali Auto Sales, Inc., 202 Cal.App.2d 215 (1962), wherein it is said, in reviewing the role of a court in construing a contract, at pages 219, 220:

"It is not the province of the court to add to the provisions thereof; to insert a term not found therein; or to make a new stipulation for the parties (Many citations)."

And in Construction Machinery Co. v. Willard & Rodman, Inc., 208 Cal.App.2d 31 (1962) it is said at page 38:

"It is not the province of the court to alter a contract by construction, or to make a new contract for the parties, nor can the court rewrite the clear terms of a lawful contract' (Many citations)."

II

THERE IS NO EVIDENCE WHATEVER TO SUPPORT APPELLANT'S BARE ARGUMENT THAT APPELLEE WAS "UNJUSTLY ENRICHED" BY THE TRANSACTION AT ISSUE AND OVERWHELMING AND UNCONTROVERTED EVIDENCE IN SUPPORT OF THE FINDING OF THE DISTRICT COURT THAT NO UNJUST ENRICHMENT HAS OCCURRED.

Now, in Opening Brief, appellant blithely ignores all of the foregoing-cited material evidence relating to the parties' actual intention, which thus substantiates the findings of fact and judgment, and vigorously urges, nevertheless, that the judgment should be reversed by this Honorable Court, with directions to the district court to enter judgment in appellant's favor for the entire \$19,950. [Op.Br. p. 29].

Indeed, appellant's entire 30 page brief appears to be filled, not with any argument on the merits, but only with impassioned allusions to "equity and good conscience" and "unjust enrichment". Thus the brief appears to be motivated merely by the bare hope that this Court will "feel sorry" for appellant; and thereby will be persuaded to ignore the evidence, and the determination by the trier of fact, and to award appellant the \$19,950, de novo, as a matter of law.

It is not to be anticipated, however, that this Court will be so swayed. The Court can take judicial notice that in the United States, in recent years, thousands of business franchises

and exclusive sales contracts have been executed, wherein the franchiser collects from the franchisee a large and substantial franchise fee, which immediately thereafter belongs to the franchiser outright and is not returnable at all; even if, unlike the situation at bar, the franchisee does continue to make substantial purchases of the franchiser's goods.

At bar, appellee granted to appellant a valuable and "exclusive franchise and license to use, sell, merchandise and otherwise deal" with its rides in 15 Western, Midwestern and Southern States, on extremely favorable terms: appellant's cost per ride was \$45 less than Palomino had paid; and on sales to appellant, appellee paid the freight charges to their destination, while Palomino had been required to pay the freight charges from appellee's plant in Santa Monica; and yet, appellee still gave appellant the opportunity to recover the full sum of \$19,950 -- not one penny of which appellee had ever actually received from appellant -- by buying only 80 additional rides. And appellant, not appellee, ultimately defaulted on the franchise agreement.

Clearly, there is nothing reprehensible, unconscionable or unjust about an arrangement whereby a franchisee is required to make a certain number of purchases of the franchiser's product in order to receive a monetary credit against a sum on deposit; particularly when, as is here admitted by appellant, the franchisee accepted the deal with its eyes open, in an

at-arms-length transaction.

In the booklet, Lewis, The Franchise System of Distribution, the author, in discussing the various business franchising procedures prevalent in America today, tells about the many transactions wherein the franchiser collects a substantial franchise fee which is entirely non-returnable; and then also discusses an arrangement very similar to the one undertaken by the parties herein, which is used by one nationally known franchiser; as follows at page 30:

" . . . The franchise fee to be paid is stated in the agreement. If the contractor meets the yearly quota, however, one third of the franchise fee is credited to the contractor to be applied against future purchases. This practice is followed for each of the first three years of the franchise. If the franchisee meets his quota in each of these years he is credited for the full franchise fee." (Emphasis added.)

Moreover, the contention that appellee has been unjustly enriched flies squarely in the face of the undisputed evidence that as a result of the franchise agreements with Palomino and with appellant, appellee expended the sum of \$265,000 for raw materials, labor, tooling, engineering, etc.

Witness Williams testified as follows:

"Q. So that by November 15, 1961, the Southland Engineering had invested approximately \$265,000 for engineering? A. \$265,000.

"Q. For prototype and for developing its production line. A. That is correct.

[91:22 to 92:3]

* * *

"Q. In other words, Southland Engineering then pursuant to this agreement wherein it received a deposit, provided raw materials, labor, place of business and spent a substantial amount of money in making itself ready, willing and able to provide under the terms of this contract these units, is that correct? A. That is correct."

[94:21 to 95:2].

The district court filed Finding of Fact 14, which alludes to appellee's \$265,000 investment on the strength of the franchise agreements at issue, and appellant has made no objection to this finding on appeal. The finding reads as follows:

"14. Defendant at all times during the period from December, 1960 to December, 1963, and during all of the times hereinabove mentioned was ready, willing and able to perform

its obligations under any and all of the several agreements hereinabove mentioned, and in order to be ready, willing and able to so perform its obligations under said agreements and other agreements, the defendant did during said period expend the sum of \$265,000.00 in setting up its plant and other facilities."

The district court also filed Conclusion of Law 3, which reads as follows:

"Defendant is not unjustly enriched in failing to give plaintiff any portion of said credit other than the said \$750.00 and plaintiff has failed to prove that the remainder of said credit exceeds the damage caused to the defendant."
(Emphasis added)

Again, appellant makes no contention in Opening Brief that this conclusion does not properly reflect the evidence heard by the court: -- relating to appellee's expenditure of \$265,000 in order to meet its obligations under the franchise agreements. Nor does appellant urge on appeal that it itself offered any evidence whatever to rebut or refute this evidence by appellee.

And, indeed, appellee proffered no such evidence. Instead, appellant limits its attack on the conclusion of law in question solely to the argument in its brief, pages 22-28, that the trial court improperly relied upon, as authority for this

conclusion, the cases of Major-Blakeney Corp. v. Jenkins, 121 Cal.App.2d 325, and Baffa v. Johnson, 35 Cal.2d 36.

Says appellant in its brief, page 25:

"Clearly, the two cases are not authority for the instant litigation."

Now, for appellant to urge that someone else has relied on case opinions which are not in point is truly a masterpiece of irony, in light of the fact that, as will be shown, infra, appellant has not cited a single case in its entire brief, of the many therein named, which has even a remote relationship to the factual issues at bar.

But, in any event, it is obvious that the district court has properly relied on the Major-Blakeney and Baffa cases for the rule that a plaintiff who alleges the forfeiture of a certain sum paid by him to a defendant has the burden of proving that the defendant, while retaining the sum paid, has actually not suffered at least an equal monetary loss as a result of the entire transaction.

Indeed, appellant concedes this in its brief, saying at pages 24, 25:

"In Baffa v. Johnson *** As in the Mayor-Blakeney case ... the Supreme Court denied the return of the \$5,000 down payment because plaintiff failed to prove that defendants' damages were less than the amount paid." (Emphasis

added)

See, also, Roebling v. Dillon, 288 F.2d 386 (D.C. Circ. 1961), wherein a defendant's judgment was affirmed and the Court said, at page 387:

" . . . in order for plaintiff to establish unjust enrichment the benefit must be shown to have been unjustly retained. Bailis v. Reconstruction Finance Corp., 3 Cir., 1942, 128 F.2d 857. We do not think plaintiff has shown this."

The two cases cited by appellant on the issue of "unjust enrichment" are not even remotely related to the factual matters at bar, have nothing whatever to do with rights under an executed franchise agreement, and are patently not in point herein:

Rodriguez v. Barnett, 52 Cal.2d 154, is an action for the rescission of an executory land purchase agreement and for the return of a deposit; and

Gonzalez v. Hirose, 33 Cal.2d 213, is a quiet title action.

III

ACCORDINGLY, THE FINDINGS AND JUDGMENT OF THE DISTRICT COURT, SUPPORTED BY VERY SUBSTANTIAL EVIDENCE, SHOULD BE AFFIRMED ON APPEAL.

Appellee is entirely confident that on the basis of the actual evidence, as hereinbefore reviewed, this Court will disregard appellant's appeal to pure emotion, and will affirm the findings and judgment of the trier of fact on the merits.

In Overman v. Loesser, 205 F.2d 521 (9 Circ. 1953) this Court said, in affirming a defense judgment, at page 522:

"Ordinarily, where there is a dispute as to fact which must be resolved from the conflicting testimony of witnesses, the findings, of the trial judge who had the opportunity to observe the demeanor of the testifying witnesses and thus to judge their credibility, are conclusive upon appeal unless clearly erroneous.

Rule 52(a) Federal Rules of Civil Procedure, 28 U.S.C.A.; United States v. United States Gypsum Co., 33 U.S. 364, 294, 68 S.Ct. 525, 92 L.Ed. 746."

And in Distillers Distributing Corporation v. J. C. Millett Co., 310 F.2d 162 (9 Circ. 1962), a breach of contract action between a manufacturer and a distributor of the

manufacturer's product, this Court said in affirming a judgment, at page 163:

"In this appeal appellant asserts that the evidence is insufficient to support the findings. Taking up the first cause of action, we find that the trial court had before it in support of its judgment the following evidence: (etc.) * * *

"There was evidence to the contrary but the trial court evidently credited the testimony of Lewis. Such was its province and we could not disturb its findings in that respect unless the evidence could be said to be so inherently improbable as not to be worthy of belief, which it was not. Lewis' testimony was substantial and sustains the finding of the trial court."
(Emphasis added).

Also in accord: Reynolds v. Royal Mail Lines, 254 F.2d 55 (9 Cir. 1958) at page 57.

Under the discussion relating to the issue of "unjust enrichment" appellee pointed out that the cases cited by appellant in Opening Brief (under "Argument IV C and IV D") purportedly in support of appellant's position on this issue, were not in point with the cause at bar.

It is equally true that all the many other cases cited by appellant in its brief are similarly nowise in point.

(Interestingly, there is not a single Federal case opinion cited in appellant's entire brief):

Under "Argument IV A", Opening Brief, pages 10-13, the following six cases are cited:

Mahony v. Standard Gas Engine Co., 187 Cal. 399 (1929)- an action between a buyer and seller of a chattel, wherein it was held that the buyer had the legal right to rescind the sales contract and have his deposit returned, when the seller furnished a grossly defective chattel.

Lubeck's Investment Co. v. Voris, 68 Cal.App. 652 (1924) - an action to recover a deposit given on real property after the buyer and seller had agreed to rescind the agreement, and to recover money retained by a real estate broker as commission for arranging the conveyance.

Philpott v. Superior Court, 1 Cal.2d 512 (1934) - a proceeding in prohibition to restrain the Superior Court of Los Angeles County from dismissing an action for want of jurisdiction. Writ denied.

Long-Way v. Newberry, 13 Cal.2d 603 (1939) - an action based on a fraudulent conveyance of real property.

Fontaine v. Lacassie, 36 Cal.App. 175 (1918) - an action for rescission of a contract between a mother and daughter-in-law, wherein the older woman gave the younger some money on

the latter's broken promise to make a home available to the oldster for life.

Briggs v. Marcus-Lesoinc, Inc., 3 Cal.App.2d 207 (1934) - an action between a manufacturer and his agent for the recovery of commission money retained by the principal (and allegedly paid out to others) without the authority of the agent.

And under "Argument IV B", pages 13-19, appellant cites eleven cases; none, likewise, in point; as follows:

Keller v. Hicks, 22 Cal. 457 (1863) - involves the assignment of an illegal County warrant.

Bennett v. Superior Court, 218 Cal. 153 (1933) - concerns a Petition for a Writ of Prohibition to restrain the Superior Court from discharging an attachment.

Cherry v. Hayden, 100 Cal.App.2d 416 (1950) - an action against an architect for the repayment of money deposited with him, under the architect's express written promise to return the money.

Van Hoosen v. Briscoe, 85 Cal.App. 746 (1927) - a suit for the return of a deposit on real property, made during a preliminary oral discussion, when no contract was ever executed by the parties.

Grant v. Long, 33 Cal.App.2d 725 (1939) - a declaratory relief action, seeking a declaration by a widow

plaintiff as to what rights were to be granted to her in respect to a life tenancy in a hotel owned by the defendant, by reason of the plaintiff's husband's investment in the corporation during his lifetime.

Jennings v. Bank of California, 79 Cal. 323 (1889) - an action for damages for refusal of the defendant to transfer certain of its stock to plaintiff.

Dunham-Carrigan-Hayden Co. v. Rubber Co., 84 Cal. App. 669 (1927) - an action between a tire manufacturer and a distributor of the tires, compelling the manufacturer to take back unsold tires which the distributor had paid for, but which he had the power to return under the contract between the parties.

Smith v. Moynihan, 44 Cal. 53 (1872) - a suit against a partnership for the value of labor performed and materials furnished.

H. S. Crocker Company, Inc. v. McFaddin, 148 Cal. App.2d 639 (1957) - a claim and delivery action for abandoned Christmas cards.

Rankin v. Miller, 179 Cal.App.2d 133 (1960) - a suit by a broker for a commission for the sale of real property.

CONCLUSION

For the foregoing reasons, appellee respectfully urges that the judgment herein should be affirmed.

Respectfully submitted,

MAGDLEN & BLACKSTOCK,
JAMES C. BLACKSTOCK, and
ABE MUTCHNIK

Attorneys for Appellee

CERTIFICATE OF COUNSEL

I, Abe Mutchnik, one of the attorneys for the above named appellee, Southland Engineering, Inc., a California corporation, do hereby certify that I have examined the provisions of Rules 18 and 19 of the above entitled Court, and that in my opinion the tendered brief on behalf of Southland Engineering, Inc. conforms to all requirements.

/s/ Abe Mutchnik

ABE MUTCHNIK

